Office - Supreme Court, U.S
FILED
SEP 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-437

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE EVENING NEWS ASSOCIATION, PETE WALDMIER, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY AND JIM GRAHAM,
Petitioners,

v.

JOSEPH JUDEUS LOCRICCHIO AND GARY FRANCELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

RICHARD E. RASSEL
JAMES E. STEWART
KEEFE A. BROOKS
Butzel Long Gust Klein & Van Zile
A Professional Corporation
1881 First National Building
Detroit, Michigan 48226
Telephone: (313) 963-8142
Counsel for Petitioners

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

QUESTION PRESENTED

May A State Constitutionally Permit Libel Plaintiffs To Pursue To Judgment Libel Claims Arising Out Of A Series Of News Articles Containing Over 10,000 Words Without Ever Disclosing To Media Defendants What Statements, If Any, In The News Articles Are Claimed To Be Factually False?

Although petitioner The Evening News Association is a corporation, it has no parent companies, no subsidiaries other than those wholly owned by petitioner and no affiliates.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions and Orders Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
1. The Decisions of the Michigan Courts Conflict in Principle with Decisions of This Court	7
Permitting Respondents To Proceed to Judgment on Their Libel Claims Without Giving Notice to Petitioners of What Statements Are Claimed To Be Factually False Deprives Petitioners of Their First Amendment Rights Without Due Process of Law	7
Introduction	7
Respondents Must Prove a False Statement of Fact	8
Due Process Requires that Petitioners Be Given Precedent Notice of the Statements Which Respondents Claim To Be Factually False	14
2. The Question Presented Involves an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court	20
Conclusion	20
Appendix A	1a
Appendix B	3a
Appendix C	7a
Appendix D	9a
Appendix E	11a
Appendix F	13a
Appendix G	16a
Appendix H	45a

TABLE OF AUTHORITIES

CASES: Page

Carroll v. *Princess Anne*, 393 U.S. 175 (1968) 18

Cox v. *Louisiana*, 379 U.S. 536 (1965) 16

Cramp v. *Bd. of Public Instruction*, 368 U.S. 278 (1961) 16

Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967) 7, 10

Freedman v. *Maryland*, 380 U.S. 51 (1965) 17, 18

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 10

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 7, 11, 12, 13, 14

Gooding v. *Wilson*, 405 U.S. 518 (1972) 15

Interstate Circuit v. *Dallas*, 390 U.S. 676 (1968) 16

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 16

Letter Carriers v. *Austin*, 418 U.S. 264 (1974) 10, 11

Lewis v. *City of New Orleans*, 415 U.S. 130 (1974) . 16

Lovell v *Griffin*, 303 U.S. 444 (1938) 16

NAACP v. *Button*, 371 U.S. 415 (1963) 14, 15

New York Times Co. v *Sullivan*, 376 U.S. 254 (1964) 7, 8, 9, 10, 11

Speiser v. *Randall*, 357 U.S. 513 (1958) 16, 17

State v. *Burnham*, 9 N.H. 34 (1837) 10

United States v. *Robel*, 389 U.S. 258 (1967) 16

Wilson v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981) 13

Winters v. *New York*, 333 U.S. 507 (1948) 15, 16

CONSTITUTION:

U.S. CONST., amend. I 2, 5, 6, 7, 9, 11, 14, 19, 20

U.S. CONST., amend. XIV 2, 7, 19, 20

UNITED STATES STATUTES:

28 U.S.C. §1257(3) 2

No.

In The
Supreme Court of the United States
October Term, 1984

THE EVENING NEWS ASSOCIATION, PETE WALDMIER, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM,
Petitioners,

v.

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

The Petitioners, The Evening News Association, *et al.*, respectfully pray that a writ of certiorari issue to review the orders of the Supreme Court for the State of Michigan entered in this case on April 27 and June 29, 1984.

OPINIONS AND ORDERS BELOW

The Order of the Circuit Court for the County of Wayne, State of Michigan, not reported, appears in Appendix A hereto, at 1a. The Opinion of the Michigan Court of Appeals, not reported, appears in Appendix B hereto, at 3a. The Order of the Michigan Court of Appeals denying Petitioner's Application for Rehearing, not reported, appears in Appendix C hereto, at 7a.

The Order of the Supreme Court for the State of Michigan denying Petitioner's Application for Leave to Appeal, reported at 419 Mich. 865 (1984), appears in Appendix D hereto, at 9a. The Order of the Supreme Court for the State of Michigan denying Petitioner's Motion for Reconsideration, not reported, appears in Appendix E hereto, at 11a.

JURISDICTION

The Order of the Supreme Court for the State of Michigan denying Petitioner's Application for Leave to Appeal was entered on April 27, 1984. The Order of the Supreme Court for the State of Michigan denying Petitioners' Motion for reconsideration was entered on June 29, 1984. This Petition for Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., amend. XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents, along with several businesses and corporations which they control, are the developers and primary operators of the nationally-famous Pine Knob Entertainment Complex. Petitioners are The Evening News Association, which publishes The Detroit News; Bill Giles, former editor and vice-president of The Detroit News; and current and former reporters, staff writers and columnists for The Detroit News.

During the course of their public careers, the Respondents have been investigated by the United States Justice Department, charged with organized crime involvement, subpoenaed to testify to at least one federal grand jury, indicted by one federal grand jury and pled guilty to that federal criminal charge that they knowingly made false statements to a federally-insured bank.

As the Respondents were developing Pine Knob, the media, including The Detroit News, reported on the criminal proceedings involving the Respondents, their involvement with the Aladdin Hotel in Las Vegas, and their business and personal associations with convicted felons and identified organized crime figures.

Respondents filed suit on April 3, 1980 based on eleven Detroit News reports dated from April 27, 1977 through April 25, 1979.[1] Two Amended Complaints were subsequently filed. The original Complaint and the Amended Complaints allege in conclusory terms that the news reports charged Respondents with criminal conduct or conduct of an immoral or reprehensible nature. None of the Complaints set forth the statements contained in the news reports upon which Respondents base their defamation claims or which they claim to be factually false.

Throughout the course of the proceedings in the trial court, Petitioners made repeated efforts to discover what

[1] The first three Counts of Respondents' Complaint purport to allege defamation claims. Only those three Counts are the subject of this Petition.

statements, if any, in these publications the Respondents claim to be factually false. Initially, Petitioners moved for summary judgment *inter alia* on the ground that Respondents' original Complaint failed as required by Michigan defamation law to set forth the falsified defamatory statements complained of. The Wayne County Circuit Court, Honorable Susan D. Borman, denied that motion.

Petitioners then filed three sets of Interrogatories requesting that as to each statement in three of the complained of news reports, Respondents answer whether that statement was claimed to be false. The trial court sustained Respondents' objections to said Interrogatories as burdensome and oppressive.

Lastly, Petitioners filed a single set of Interrogatories requesting Respondents to identify which statements they contended were false statements of fact. After Respondents' objections to these latter Interrogatories were denied, Respondents answered that they did not base their libel claims on any false statement of fact in the ten thousand plus words contained in the news reports. Rather, Respondents answered that they based their libel claims on the allegedly false portrayal, implications, imputations or insinuations allegedly arising from the admittedly true statements. Their exact answer read in relevant part:

> In regard to Interrogatory 1(a), plaintiffs, Joseph JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that *the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article*, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia"; individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agree-

ments and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.

(emphasis added).

Based on Respondents' answers as set forth above, Petitioners moved for summary judgment as to the libel claims on the ground that there was no genuine issue of any material fact that the statements complained of were true, and thus Respondents could not maintain an action for libel as a matter of Michigan and Federal Constitutional law.[2] Respondents resisted the motion on the ground that the allegedly false implications and innuendoes arising from the publications in question would support their libel claims, although they were not alleging the falsity of any of the underlying statements of fact. The trial court denied Petitioners' motion. (Appendix A, at 1a)

By Order dated August 5, 1982, the Michigan Court of Appeals granted Petitioners' Application for Leave to Appeal. On appeal, Petitioners contended *inter alia* that to permit Respondents to proceed with their libel claims when they had not and could not identify any false statement of fact, was contrary to controlling Michigan authority and was further a deprivation of the Petitioners' rights under the First Amendment to the United States Constitution.[3]

---

[2] Paragraph 6 of Petitioners' Motion, dated March 12, 1982, stated in pertinent part:

> As a matter of Federal constitutional law and as a matter of Michigan common law, a libel plaintiff must prove . . . that the complained of publication contained false statements of fact. (Appendix F, at 15a)

[3] In Petitioners' Brief on Appeal to the Court of Appeals, the Petitioners presented argument under the heading: "As a Matter of Federal Constitutional Law a Libel Claim Must Be Based on False Statements." (Appendix G, at 38a)

On August 24, 1983, the Court of Appeals issued its Per Curiam Opinion denying Petitioners' appeal. (Appendix B, at 3a) The Court of Appeals held that Respondents had stated a claim for libel and had raised a genuine issue of material fact on the issue of falsity in relying on the allegedly false implications and insinuations, notwithstanding that Respondents had not and could not identify any statement of fact contained in the news reports which they claim is false, and notwithstanding that Respondents' Complaints give Petitioners absolutely no notice of what they are called upon to defend in this action. The Court of Appeals did not reach the constitutional questions presented. The Court of Appeals denied Petitioners' Application for rehearing on October 17, 1983. (Appendix C, at 7a)

Petitioners next sought leave to appeal to the Michigan Supreme Court. Petitioners again asserted that to allow Respondents to pursue their defamation claims was contrary to controlling Michigan authority and a deprivation of the freedom of speech and press rights guaranteed to Petitioners under the First Amendment.[4] The Michigan Supreme Court denied leave to appeal on April 27, 1984. (Appendix D, at 9a) That Court further denied Petitioners' Motion for Reconsideration on June 29, 1984. (Appendix E, at 11a)

[4] In Petitioners' Brief in Support of Application for Leave to Appeal to the Michigan Supreme Court, Petitioners presented argument under the heading: "It is an Unconstitutional Infringement on First Amendment Freedoms for a Publisher to be Held Liable For Defamation Without Allegation and Proof of Factual Falsity." (Appendix H, at 74a)

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS OF THE MICHIGAN COURTS CONFLICT IN PRINCIPLE WITH DECISIONS OF THIS COURT.

Permitting Respondents To Proceed to Judgment on Their Libel Claims Without Giving Notice to Petitioners of What Statements Are Claimed To Be Factually False Deprives Petitioners of Their First Amendment Rights Without Due Process of Law.

Introduction

Petitioners find themselves in the preposterous position of having to prepare for a libel trial, involving over ten thousand words, in eleven separate articles, having been given no precedent notice of exactly what statements they are being called upon to defend. This state procedure violates all notions of fundamental fairness and deprives the Petitioners of their First Amendment rights without due process of law, in patent violation of the Fourteenth Amendment to the United States Constitution.

Since this Court's landmark decision in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), this Court has grappled with the striking of an equitable balance between the First Amendment's protection of freedom of speech and of the press on the one hand, and the States' interest in protecting the reputations of their citizens on the other hand. In striking this balance, the Court has accorded the States some measure of protection depending on the status of persons reported on. *See,* e.g., *New York Times, supra; Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974).

While the States have been afforded some latitude in devising substantive and procedural rules of law in protecting the reputations of their citizens, well-settled doctrine dictates that States must exercise this power by the least restrictive means available. This is to assure that State rules of law go no further than is necessary to accomplish their

recognized legitimate interests and do not impermissibly trample upon fundamental rights of free speech and due process of law.

The Michigan Court of Appeals in this case has clearly exceeded the latitude afforded by this Court to the States in protecting the reputation interests of their citizens. It has adopted a procedural rule of law which impermissibly threatens to impose liability on speakers of constitutionally protected speech.

A fundamental tenet of due process of law is the granting of meaningful notice to a defendant of exactly what he is called upon to defend. Only with meaningful notice can a defendant adequately prepare for and conduct his defense of charges asserted against him. This is no less true in an action for publication of allegedly libelous statements.

Four years after this action was instituted, and now on the eve of trial, Petitioners have yet to receive any meaningful notice of what they are to defend in this action. The Court of Appeals has ruled, in effect, that Respondents need never disclose to Petitioners what statements of fact they claim to be false and defamatory. Such a procedure simply does not comport with the requirements of due process of law.

Decisions of this Court have settled that a libel plaintiff must prove a false statement of fact as a prerequisite to the constitutional imposition of liability in a libel case. Due process of law requires that Petitioners be informed exactly what statements Respondents will rely on at trial to sustain this burden. The Court of Appeals' decision deprives Petitioners of their due process rights in this regard and portends grave injury to constitutionally protected speech.

Respondents Must Prove a False Statement of Fact.

This Court first recognized constitutional protection for allegedly libelous statements in *New York Times, supra,* 376

U.S. 254 (1964). Decided in the context of criticism of official conduct, the Court held that factual error was a necessary, though not sufficient, prerequisite for the constitutional imposition of liability on a publisher of allegedly libelous statements.

> If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.

(emphasis added) *Id.*, 376 U.S. at 273.

In reviewing the specific allegations of falsity in that case, the Court again emphasized that the issue of factual falsity is one of constitutional magnitude.

> The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that 'truckloads of police . . . ringed the Alabama State College Campus' after the demonstration on the State Capitol steps, and that Dr. King had been 'arrested . . . seven times.' These statements were false only in that the police had been 'deployed near' the campus but had not actually 'ringed' it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. *The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here.*

(emphasis added) *Id.*, 376 U.S. at 289. Certainly if imposing liability on the making of "slight inaccuracies" raised serious constitutional problems, the imposition of liability on the making of completely true statements would fly in the face of First Amendment protections.

Decided that same term was the case of *Garrison* v *Louisiana*, 379 U.S. 64 (1964), in which this Court struck down as unconstitutional a state statute which allowed for imposition of liability on the making of true statements if actuated by malice. Quoting with approval from *State* v. *Burnham*, 9 N.H. 34, 42-43 (1837), the Court noted:

> 'If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .'

Id., 379 U.S. at 73. The Court then squarely disposed of this issue in holding that:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.

Id., 379 U.S. at 74.

The protection of the *New York Times* Actual Malice standard was extended to publications concerning public figures in *Curtis Publishing Co., supra*, 388 U.S. 130 (1967). As in *New York Times*, the Court held that factual falsity was a necessary prerequisite to the constitutional imposition of liability.

> While the *truth of the underlying facts* might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm . . . we have rejected, in prior cases involving materials and persons commanding justified and important public interest, the argument that a finding of falsity alone should strip protections from the publisher.

(emphasis added) *Id.*, 388 U.S. at 152.

The protection of the *New York Times* Actual Malice standard was further extended to labor disputes in the case of *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974). In *Letter*

Carriers, the plaintiffs complained of, among other things, Jack London's definition of a "Scab", which stated in part:

> 'Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*
>
> *Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.*'

(emphasis in original) *Id.*, 418 U.S. at 268. The plaintiffs contended that this definition of a "SCAB" implied that they were "traitors", were "lacking 'character' " and had "rotten principles". *Id.*, 418 U.S. at 283. The Court held, however, that plaintiffs had not satisfied their burden of proving factual falsity.

> We believe that publication of Jack London's rhetoric is equally entitled to the protection of the federal labor laws. The *sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of *falsehood*. Mr. Justice Clark put it quite bluntly: 'the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.' 383 U.S. at 63. Before the test of reckless or knowing falsity can be met, *there must be a false statement of fact*. *Gertz* v. *Robert Welch Inc.*, *post*, at 339-340.

(emphasis added, footnote omitted) *Id.*, 418 U.S. at 283-284.[5]

In *Gertz* v. *Robert Welch*, *supra*, 418 U.S. 323, this Court declined to extend the *New York Times* Actual Malice test to publications concerning private persons. The

[5] While the Court decided *Letter Carriers* on the basis of federal labor law, Justice Douglas noted that the same result would obtain under the First Amendment. *Id.*, 418 U.S. at 287, concurring opinion.

Court did not, however, retreat from the principle that a finding of factual falsity is constitutionally required for the imposition of liability.

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in *false statements of fact.*
>
> * * *
>
> [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his *factual assertions* may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious *statements* does not accord adequate protection to First Amendment liberties.
>
> * * *
>
> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

(emphasis added) *Id.*, 418 U.S. at 339-340, 347. (See also page 348 referring to the requirement of a "factual misstatement".)

Gertz teaches several things. First, regardless of the standard of liability employed, a fundamental prerequisite to the constitutional imposition of liability is the finding of a "factual misstatement" or "false statement of fact." So long as the publisher has printed only the truth, as in this case, liability cannot be constitutionally imposed.

Second, *Gertz* counsels that liability may not be imposed without fault. Common sense dictates that to avoid imposing liability without fault, the burden must be placed on the plaintiff to prove factual falsity. This was the holding of the Sixth Circuit in *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), where the Court reasoned:

> Tennessee follows the common law rule developed during the era of strict liability in defamation cases. At common law, prior to the application of constitutional standards in the area of libel and slander, the *truth* of the *defamatory statement* was an affirmative defense for the defendant to prove. . . . Although falsity was an element of a cause of action for defamation . . ., once a statement was shown to be defamatory, falsity was presumed.
>
> * * *
>
> The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. Falsity is an element of fault under the First Amendment that should be proved and not presumed. . . .As a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity.

(emphasis added, citations omitted) *Id.*, 642 F.2d at 374, 376.

The reason factual falsity is subsumed in the concept of fault and relates only to "false statements of fact" comes into even sharper focus when one considers whether or not the defendant has met his standard of care. Whatever that standard of care may be, whether negligence or Actual Malice, against what would we measure it if it relates to unexpressed and unprinted implications and innuendoes? What more can a defendant do but check the accuracy of what he is going to print? How could the Court or a jury determine whether the defendant used due care or acted

without Actual Malice in assuring the accuracy of something he never printed? How does anyone check the accuracy of something he never said and has no intention of saying? To even contemplate the congeries of problems presented by a rule of law that holds a publisher responsible for the truth or falsity of unexpressed and unprinted implications or innuendoes points up the absurdity of the Respondents' position in this case.

Lastly, *Gertz* provides that "there is no such thing as a false idea." *Id.*, 418 U.S. at 339. Unexpressed and unprinted implications and innuendoes are, at most, unexpressed and unprinted "ideas". Because there is no such thing as a false idea, Respondents cannot sustain their constitutional burden of proving factual falsity with reference to such apocryphal implications and innuendoes.

Due Process Requires That Petitioners Be Given Precedent Notice of the Statements Which Respondents Claim To Be Factually False.

Given that a libel plaintiff must prove a false statement of fact, the focus shifts to the procedure endorsed by the Michigan Courts in this case for the resolution of Respondents' libel claims. While the States have been given some freedom to regulate in areas touching upon basic constitutional rights, they must do so in the least restrictive manner so as to avoid imposing impermissible burdens on the exercise of such rights.

In *NAACP* v. *Button*, 371 U.S. 415 (1963), this Court struck down as unconstitutionally vague and overbroad a state statute regulating the improper practice of law as infringing on the First Amendment's right of freedom of association. In reaching the decision, the Court noted:

> [S]tandards of permissible statutory vagueness are strict in the area of free expression.
>
> * * *

> Broad prophylactic rules in the area of free expression are suspect. . . .Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

(citations omitted) *Id.*, 371 U.S. at 432, 438. Similarly, in *Gooding* v. *Wilson*, 405 U.S. 518 (1972), this Court struck down as unconstitutionally vague and overbroad a statute seeking to punish the uttering of "opprobrious words or abusive language", noting in part:

> '[I]n every case the power to regulate must be exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' . . . 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *NAACP* v. *Button, supra,* at 433.

(citation omitted) *Id.*, 405 U.S. at 522.

In consonance with the above rule, this Court has repeatedly examined state rules of law which threaten to stifle the exercise of constitutionally protected freedoms. This has been especially true in the area of free speech. In *Winters* v. *New York*, 333 U.S. 507 (1948), this Court struck down as vague and overbroad a state statute regulating the sale of "obscene" materials.

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. . . . A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.

(citations omitted) *Id.*, 333 U.S. at 509-510. Similary, in *Cramp* v. *Bd. of Public Instruction*, 368 U.S. 278 (1961), this Court struck down as unconstitutional Florida's requirement that teachers take an oath that they had never lent aid, support, advice, ccunsel or influence to the Communist Party.

> The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. As we said in *Smith* v. *California*, ' . . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' 361 U.S. 147, at 151. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.' *Stromberg* v. *California*, 283 U.S. 359, 369.

Id., 368 U.S. at 287-288. For other similar cases, *see: Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974); *Interstate Circuit* v. *Dallas*, 390 U.S. 676 (1968); *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

This doctrine is not limited to statutes or other substantive rules of law. It is equally applicable to procedural rules of law which threaten to invade protected freedoms, especially freedom of speech. In *Speiser* v. *Randall*, 357 U.S. 513 (1958), this Court condemned as unconstitutional a

procedural rule which placed the burden of proof on veterans to prove that they were not engaged in unlawful advocacy to be entitled to a state property tax exemption. In so ruling, the Court noted:

> To experienced lawyers it is commonplace that the outcome of a lawsuit — and hence the vindication of legal rights — depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. *Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.* And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. *Powell* v. *Alabama*, 287 U.S. 45, 71. When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights — rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, . . . *the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.*

(emphasis added, citations omitted) *Id.*, 357 U.S. at 520-521. Similarly, in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), this Court examined procedures employed in non-criminal censorship proceedings involving motion pictures. The Court noted in part:

> '[U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.' *Marcus* v. *Search Warrant*, 367 U.S. 717, 731.

Id., 380 U.S. at 57. Lastly, in *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968), this Court found unconstitutional a process by which an *ex parte* restraining order against a political rally was obtained, stating in part:

> As the Court said in *Freedman* v. *Maryland, supra*, at 58, a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'
>
> * * *
>
> In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Id., 393 U.S. at 181, 183-184.

Applying the foregoing rules to this case, it is clear that the procedure adopted by the Michigan Court of Appeals fails to pass constitutional muster. The rule of law adopted affords a libel defendant absolutely no notice of what he is called upon to defend and threatens to stifle protected speech.

The inhibiting effect on speech under such a procedure is plain. It is one thing for a speaker or publisher to fear the institution of libel actions where the complained of statements are to be specified in the complaint. In such cases, through discovery and pre-trial motions, the frivolous claims can be disposed of without the costs and disruption of lengthy trials and/or post-trial appeals, and the non-frivolous case can be adequately prepared for defense. It is quite another thing to fear the imposition of libel suits where the plaintiff need never disclose which, if any, statements he claims to be factually false. In such cases, it is literally impossible to dispose of even the most frivolous cases prior to trial and/or post-trial appeal, let alone adequately prepare for trial.

Such a rule of law also portends a grave danger of punishing legitimate and constitutionally protected speech. Without specification of the complained of statements, how is a libel defendant to proceed through discovery and adequately prepare its defense? Is not unfair surprise at trial an inevitable result of such a rule? How are the Petitioners to prepare to meet Respondents' proofs regarding amorphous, unprinted and unexpressed implications and innuendoes? Is there not posed a grave danger of incorrect and unjust results because of ill-defined pleadings and issues and ill-prepared cases? Clearly the danger of imposing liability on protected speech is greatly heightened by a procedure which allows a libel plaintiff to proceed to trial and judgment without ever informing the defendant which statements will be at issue at the trial.

Furthermore, the State of Michigan has not adopted the least restrictive means in exercising its right of protecting the reputation interests of its citizens. The procedural rule adopted by the Court of Appeals goes much further than is even reasonable, let alone necessary, for the vindication of reputation interests and at the same time creates the threat of long, costly trials in every libel suit filed and of erroneous determinations on the evidence. Conversely, requiring a libel plaintiff to merely state in his complaint which statements he claims to be factually false, imposes no meaningful obstacle to the prosecution of his action, but at the same time affords the defendant appropriate safeguards guaranteed by the First and Fourteenth Amendments.

Due process requires meaningful notice and an opportunity to defend. The procedure adopted by the Michigan Court of Appeals deprives Petitioners of meaningful notice and an opportunity to defend, and thereby deprives Petitioners of their First Amendment rights without due process of law.

2. THE QUESTION PRESENTED INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The effect of the decision of the Michigan Court of Appeals extends well beyond this libel action against Petitioners. It affects the free speech rights of every citizen of the State of Michigan.

To say the least, the decision of the Court of Appeals has a direct, chilling effect on the First Amendment rights of the Petitioners. However, the decision's threat to fundamental First Amendment rights extends much further and cuts much deeper than this case or these parties. Until the Michigan Court of Appeals' decision is corrected, citizens of the State of Michigan cannot write or say anything without the fear of long, costly libel actions wherein they will not receive any notice of or be permitted to discover just what they are being called upon to defend.

The Court of Appeals' decision is wrong as a matter of Federal Constitutional Law. It effectively destroys guaranteed First and Fourteenth Amendment rights in the State of Michigan by not requiring that a libel plaintiff inform the defendant of what statements, if any, he claims to be factually false. As a matter of Federal Constitutional law, a libel plaintiff must afford the defendant notice of exactly what statements he is called upon to defend. This is an issue which cries out for this Court's immediate attention.

CONCLUSION

In striking the balance between First Amendment rights of free speech and the States' interests in protecting the reputation interests of their citizens, this Court has afforded the States some leeway in exercising this right. The States are constitutionally bound, however, to adopt only procedures which comport with the First and Fourteenth Amendments to the United States Constitution.

The Constitution requires that a libel plaintiff prove a false statement of fact in a libel action. The States are not free to disregard this constitutional burden of proof.

The Constitution further provides that in seeking to vindicate the reputation interests of their citizens, the States must adopt rules of law and procedure which only go so far as is necessary to accomplish this purpose and which do not impermissibly trample on protected freedoms. The States are no more free to disregard this constitutional requirement.

The Michigan Court of Appeals' decision in this case simply transcends constitutional boundaries in seeking to vindicate the reputations interests of Michigan citizens. It provides a rule of law which inhibits the legitimate exercise of free speech, which is not reasonably necessary to accomplish the State's purpose and which gravely threatens to punish legitimate and constitutionally protected speech. It is thus constitutionally infirm.

Due process of law requires, at a minimum, meaningful notice of what a person is called upon to defend. In a libel case, this requires, at a minimum, notice to the defendant of what statements the plaintiff contends are factually false. Petitioners herein seek only what due process commands, meaningful notice of what statements they are called upon to defend.

For the reasons hereinabove stated, a writ of certiorari should issue to review the decisions of the Michigan Courts.

Respectfully submitted,
RICHARD E. RASSEL
JAMES E. STEWART
KEEFE A. BROOKS

Butzel Long Gust Klein & Van Zile
A Professional Corporation
1881 First National Building
Detroit, Michigan 48226
Telephone: (313) 963-8142

Counsel for Petitioners

Dated: September 19, 1984

APPENDIX

Appendix A
(Entered: April 6, 1982)

APPENDIX A
(Entered: April 6, 1982)

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs,

HON. SUSAN D. BORMAN

VS.

NO: 80-012-145 CZ

THE EVENING NEWS ASSOCIATION,
INC., a Michigan Corporation,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
ROBERT ANKENY, and JIM GRAHAM,
Jointly and Severally,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' LIBEL CLAIMS

At a session of said Court, held in the County of Wayne, State of Michigan on April 2, 1982

PRESENT: Honorable Susan D. Borman
Circuit Judge

Upon the reading and filing of defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, and the Court being otherwise fully advised in the premises;

Appendix A
(Entered: April 6, 1982)

IT IS HEREBY ORDERED that defendants Motion for Summary Judgment as to Plaintiffs' Libel Claims is denied.

(s) SUSAN D. BORMAN
Circuit Judge

Approved as to form:

By: JEREMIAH J. KENNEY (P 24810)
Attorney for Plaintiffs
2000 Buhl Building
Detroit, Michigan 38226

By: JAMES E. STEWART (P 23254)
Attorney for Defendants
1881 First National Bldg.
Detroit, Michigan 48226

Appendix B
(Entered: August 24, 1983)

APPENDIX B
(Entered: August 24, 1983)

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v

No. 64729

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES,
JEFF LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
and ROBERT ANKENY,
Defendants-Appellants.

BEFORE: V.J. Brennan, P.J., M.H. Wahls and M. Dodge*, JJ.

PER CURIAM

This lawsuit arises out of a series of eleven allegedly defamatory articles published in the Detroit News between April 27, 1977 and April 25, 1979 concerning the activities of plaintiffs Locricchio and Francell with regard to their development and operation of the Pine Knob entertainment complex. Defendant, the Evening News Association, Inc., publishes the Detroit News, defendant Giles is its editor and Vice-President, and the remaining defendants are reporters, staff writers, and columnists for the Detroit News.

On April 3, 1980, plaintiffs filed a ten-count complaint, the first three counts of which allege a cause of action for libel based on the news articles. The articles, consisting of in excess of 10,000 words, accompanied the complaint. On October 7, 1981, defendants filed interrogatories requesting, among other things, that plaintiffs identify with particularity

---

* Circuit Judge, sitting on the Court of Appeals by assignment.

each and every statement claimed to be defamatory, and each and every statement claimed to contain false statements of fact in each publication relied upon by plaintiffs in support of their libel claims. Plaintiffs responded in part as follows:

> "*[T]he defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organizea criminal society, otherwise known as the 'Mafia'; individuals of low moral and character;* that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.
>
> * * *
>
> "As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, *the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, the full portrayal, implication, imputation and/or insinuation can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other.* Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes self-evident." (Emphasis added.)

Based on these answers, defendants moved for summary judgment, GCR 1963 117.2(3). The trial court denied the motion. Defendant take this interlocutory appeal by leave granted.

Appendix B
(Entered: August 24, 1983)

Defendants assert on appeal, as they did in support of their motion for summary judgment, that no action for libel exists here because plaintiffs admit that their allegations of defamation are not based on a specific false statement in any particular article. Defendants contend that plaintiffs' allegations that the entire series of articles falsely portrayed plaintiffs as members or associates of an organized criminal society, known as the "Mafia", cannot support an action for libel.

We disagree. " 'To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " *Sanders* v *Evening News Association*, 313 Mich 334, 340; 21 NW2d 152 (1946). The pleadings, including plaintiffs' answers to the interrogatories, raise a genuine issue of material fact as to whether the specified articles, read as a whole, carry a defamatory insinuation or inference that plaintiffs are associated with organized crime. Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion. See *Caldwell* v *Crowell Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5); *cert den*, 332 US 776 (1947), *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn 1978), 50 Am Jur 2d, Libel and Slander, §13, pp 528-529, Prosser, *Torts*, (4th ed, 1971), §111.

Plaintiffs did not concede the truth of the alleged insinuation. They specifically state in their response to interrogatories that the entire series of articles represented "a *false* portrayal implication, imputation and/or insinuation" that plaintiffs are or were members and/or associates of an organized criminal society, otherwise known as the Mafia.

The pleadings have given rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment.

Appendix B
(Entered: August 24, 1983)

The trial court properly denied defendant's motion for summary judgment.

Affirmed.

/s/ V.J. Brennan
/s/ M.H. Wahls
/s/ M. Dodge

APPENDIX C
(Entered: October 17, 1983)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Seventeenth day of October in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
VINCENT J. BRENNAN
Presiding Judge
MYRON H. WAHLS
MICHAEL E. DODGE
Judges

JOSEPH JUDEUS LOCRICCHIO And
GARY FRANCELL,
Plaintiffs-Appellees,

v

Docket #64729
L.C. #80 012 415 CZ

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
And ROBERT ANKENY,
Defendants-Appellants.

In this cause an application for rehearing having been filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

Appendix C
(Entered: October 17, 1983)

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of October in the year of our Lord one thousand nine hundred and eighty-three.

(s) Ronald L. Dzierbicki
Chief Clerk

Appendix D
(Entered: April 27, 1984)

APPENDIX D
(Entered: April 27, 1984)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of April in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

72978
& (39)

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES,
JEFF LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILING,
ROBERT ANKENY and JIM GRAHAM,
jointly and severally,
Defendants-Appellants.

SC: 72978
COA: 64729
LC: 80-012-145-CZ

On order of the Court, the motion for extention [sic] of time to file answer is considered, and it is GRANTED.

Appendix D
(Entered: April 27, 1984)

The application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should now be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 27th day of April in the year of our Lord one thousand nine hundred and eighty-four.

[SEAL]

(s) Jacqueline B. MacKinnon
Deputy Clerk

Appendix E
(Entered: June 29, 1984)

APPENDIX E
(Entered: June 29, 1984)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of June in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices

72978(45)

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v

EVENING NEWS ASSOCIATION, INC., PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, jointly and severally,
Defendants-Appellants.

SC: 72978
COA: 64729
LC: 80-012-145-CZ

On order of the Court, the motion by defendants-appellants for reconsideration of this Court's order of April 27, 1984, is considered, and the motion is DENIED, because it does not appear that the order was entered erroneously.

Appendix E
(Entered: June 29, 1984)

0625

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 29th day of June in the year of our Lord one thousand nine hundred and eighty-four.

[SEAL]

(s) Corbin R. Davis
Clerk

Appendix F

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

JOSEPH JUDEUS LOCHRICCHIO
and GARY FRANCELL,
Plaintiffs,

vs

THE EVENING NEWS ASSOCIATION INC.,
a Michigan Corporation, PETER
WALDMIER; BILL GILES; JEFF LADERMAN;
MICHAEL F. WENDLAND; JEAN GADOMSKI;
RICHARD WILLING; ROBERT ANKENY; JIM
GRAHAM; and GENE GUIDI, Jointly and
Severally,
Defendants.

MOTION FOR SUMMARY JUDGMENT
AS TO PLAINTIFFS' LIBEL CLAIMS

Defendants, The Evening News Association, Pete Waldmeir, Bill Giles, Jeff Laderman, Michael F. Wendland, Jean Gadomski, Richard Willing, Robert Ankeny and Jim Graham, move for summary judgment pursuant to GCR 1963, 117.2(3), for the following reasons:

1. Plaintiffs filed a ten-count Complaint against defendants on April 3, 1980.

2. Counts I, II and III of plaintiffs' Complaint allege causes of action for libel based solely on the publication by The Detroit News of some eleven news reports spanning the period from April 27, 1977 through April 25, 1979.

3. By Order of August 19, 1981, this Court dismissed plaintiffs' libel claims as to The Detroit News' reports published April 27, 1977, May 4, 1977, May 5, 1977, October 6, 1977 and March 29, 1977.

4. Defendants sent a Fourth Set of Interrogatories requesting plaintiffs to identify which statements in various complained of news reports they claimed to be defamatory, which statements they claimed to be false, and which documents or witnesses they would rely on to support their allegations that certain statements were defamatory or false. A copy of this Fourth Set of Interogatories is Attachment 1 hereto. Plaintiffs objected to these interrogatories, but on December 4, 1981, the Court ordered that they be answered.

5. Plaintiffs filed answers to this Fourth Set of Interrogatories on February 24, 1982 and stated, in relevant part, as follows:

> "In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEUS LOCHRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the 'Mafia'; individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature."

A copy of plaintiffs' answers are Attachment 2 to this motion.

6. As a matter of Federal constitutional law and as a matter of Michigan common law, a libel plaintiff must prove not only that a complained of publication is capable of a defamatory interpretation but must also prove that the complained of publication contained false statements of fact. This is true irrespective of any determination as to the privileged nature of the complained of publication.

7. It is clear from plaintiffs' answers to defendants' Fourth Set of Interrogatories that while they claim that The Detroit News' reports are defamatory of them, they are not claiming that there is any false statement of fact in any of these reports. Accordingly, they fail to state a claim for libel, as a matter of federal constitutional law and of Michigan common law.

WHEREFORE, defendants pray that this Court enter an Order dismissing Counts I, II and III of plaintiffs' Complaint.

This motion is based on the files and records herein and upon a supporting brief and affidavit filed herewith.

Respectfully submitted,

BUTZEL LONG GUST KLEIN & VAN ZILE
a Professional Corporation
By: Richard E. Rassel (P19243)
By: (s) James E. Stewart (P23254)
By: (s) Keefe A. Brooks (P31680)
1881 First National Building
Detroit, Michigan 48226
(313) 963-8142

Dated: March 12, 1982

APPENDIX G
STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,
Plaintiffs-Appellees,

vs.

THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM, Jointly and Severally,
Defendants-Appellants.

Court of Appeals No. 64729
Wayne Circuit Court No. 80-012-415-CZ
Hon. Susan D. Borman

APPELLANTS' BRIEF ON APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

BUTZEL LONG GUST KLEIN & VAN ZILE,
A Professional Corporation
By: Richard E. Rassel (P19243)
By: James E. Stewart (P23254)
1881 First National Building
Detroit, Michigan 48226
(313) 963-8142

Attorneys for Defendants-Appellants

Appendix G

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	18a
QUESTIONS PRESENTED	20a
STATEMENT OF FACTS	21a
ARGUMENT	26a
As a Matter of Michigan Common Law a Libel Claim Must be Based on False Statements	27a
As a Matter of Federal Constitutional Law a Libel Claim Must be Based on False Statements	38a
CONCLUSION AND RELIEF REQUESTED	42a

Appendix G

INDEX OF AUTHORITIES

Page

Caldwell v *Crowell-Collier Publishing Co,*
161 F 2d 333 (5th Cir 1947) 38a

DeGuvera v *Sure Fit Products,*
14 Mich App 201 (1969) 28a

Edwards v *Chandler,*
14 Mich 471 (1876) 31a

Gertz v *Robert Welch, Inc.,*
418 U.S. 323 (1974) 39a, 40a, 41a, 42a

Hysko v *Polonia Publishing Co.,*
239 Mich 676 (1972) 33a, 34a

Mihalik v *Duprey,*
417 NE 2d 1238 (Mass App 1981) 36a, 37a

Orr v *Argus-Press Co,*
586 F 2d 1108 (1978) 30a, 31a, 41a, 42a

Postill, et al. vs. *Booth Newspapers, Inc., et al.,*
____ Mich App ____ (Docket Nos. 55959, 55990,
55996, August 23, 1982) 27a

Pursell v *Wolverine-Petronix,*
44 Mich App 416 (1973) 29a

Sanders v *Evening News Association,*
313 Mich 334 (1946) 31a, 32a, 33a

Schaefer v *Lynch,*
406 So 2d 185 (1981) 35a, 36a

Steadman v *Lapensohn,*
408 Mich 50 (1980) 38a

Sullings v *Shakespeare,*
46 Mich 408 (41 AM Rep 166) 33a

Van Lonkhuyzen v *Daily News Co.,*
195 Mich 283 (1917) 34a, 35a

Wilson v *Scripps-Howard Broadcasting Co,*
642 F 2d 371 (6th Cir.), *cert granted,*
704 L Ed 377 (1981) 40a

Appendix G

INDEX TO AUTHORITIES—(Cont'd)

PUBLIC ACTS, STATUTES, etc. Page

3 Devitt and Blackmar,
Federal Jury Practice & Instructions
(3rd Ed) §84.08 ..... 29a, 30a

The Law of Torts §111 p 739 ..... 28a

Appendix G

QUESTIONS PRESENTED

As a matter of law may a libel suit continue where after two years of discovery plaintiffs admit that the 10,000 plus word series of news reports sued upon contains no false statements of fact.

The Circuit Court held: Yes.

Defendants-Appellants contend that the answer is: No.

Appendix G

STATEMENT OF FACTS

Plaintiffs-Appellees, Joseph Locricchio and Gary Francell are the impressario owner/developers of the nationally famous, heavily advertised and state licensed Pine Knob Entertainment complex. Although no part of the complex bears their names, there is wide public interest in both men stemming from their development and promotion of the multitude of public entertainment, dining and recreation facilities at Pine Knob; their disputes with various public bodies over the years; their and Pine Knob's continuing financial difficulties; their association with known crime figures; and their own indictment and conviction for loan fraud. Plaintiff, Locricchio also gain publicity in the mid 70's owing to his association with the hidden crime figure investors in the scandal ridden Aladdin Hotel.

Defendants-Appellants, The Evening News Association, Pete Waldmeir, Bill Giles, Jeff Laderman, Michael F. Wendland, Jean Gadomski, Richard Willing, Robert Ankeny, and Jim Graham are editors or reporters of defendant, The Detroit News.

Since Locricchio and Francell took over the failing Pine Knob ski hill in 1970 and transformed it into an all season entertainment complex, The Detroit News has published scores of articles about Pine Knob. This lawsuit involves eleven of the news articles published between April 17, 1977 and April 25, 1979. The articles contain over 10,550 words. It is now admitted that the articles contain no false statements of fact.

THE COMPLAINT

Plaintiffs-Appellees' Complaint, Amended Complaint and Second Amended Complaint all contain Ten Counts. Count one through three of all three versions attempt to allege libel claims.[1]

[1] It is only these counts which are the subject of this appeal.

Despite the promise of specificity implicit in a twice Amended Complaint containing Ten Counts, neither the Complaint nor the Amended Complaint nor the Second Amended Complaint set forth the portions of the eleven articles which plaintiffs claim to be false and libelous.

DISCOVERY

In view of the Complaint's lack of specificity, much of the tortured history of the case has centered around appellants' continuing efforts to discover which statements in the 10,000 odd words of these articles that appellees claim to be false and thus, capable of supporting a libel claim. First, appellants moved for summary judgment under the established Michigan law that the Complaint failed to state viable libel claims because the false and defamatory statements complained of were not alleged. The Trial Judge, Judge Borman, denied this motion. Appellants then served interrogatories as to each statement in three of the news reports asking plaintiffs whether that statement was claimed to be false. Plaintiffs claimed that these interrogatories were oppressive. The trial judge agreed. Continuing the effort to determine what portions of the articles they were going to have to defend, appellants served a new set of interrogatories. The following is illustrative:

> 1. With respect to The Detroit News publication entitled "More on Mr. Tezlaff and His Curious Testiness" dated April 8, 1979:
>
> (a) Identify with particularity each and every statement you claim to be defamatory;
>
> (b) Identify with particularity each and every statement you claim contains false statements of fact;
>
> (c) For each statement identified in subpart (b) hereof, state in detail the particular fact or facts in said statement that are false;

(d) With respect to each statement identified in subpart (b) hereof, state all facts known to you and/or upon which you rely to support your claim that said fact or facts are false;

(e) With respect to each statement identified in subpart (b) hereof, state the full name, residence address, residence telephone number, present business address or employer, business or employment address and business or employment telephone number of all witnesses upon whom you rely to prove the falsity of said fact or facts and state the substance of said expected testimony of each such witness;

(f) With respect to each statement identified in subpart (b), describe with particularity each document upon which you rely to prove the falsity of said fact or facts and state the substance, contents, the present location and current custodian, of such document.

Plaintiffs sought to avoid answering these questions as well but the trial judge ordered them to answer. Their answers, when finally received, explained their reluctance to get specific:

Plaintiffs, JUDEUS LOCRICCHIO AND GARY FRANCELL, answer Defendants' Fourth Set of Interrogatories as follows:

1. In response to Interrogatory number 1 and all subparts thereto, plaintiffs JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the submitted interrogatories pertain to the Complaint, filed on plaintiffs' behalf, against the various named defendants. Furthermore, plaintiffs have been advised that the present cause of action contains numerous

allegations based on various legal theories. The Defendants' Fourth Set of Interrogatories, by their nature and terminology, relate only to the allegations of defamation. As such, plaintiffs' response to Defendants' Fourth Set of Interrogatories are to be strictly limited and/or construed to be applicable only to the allegations of defamation.

In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that *the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article,* but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia"; individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.

In addition, defendants knowingly and purposely caused to be published derogatory information that the defendants failed to ascertain the veracity thereof, or, alternatively, caused to be published derogatory information concerning plaintiffs that defendants knew was unsubstantiated despite the facts that defendants knew and/or callously disregarded the detrimental impact that same would have on the plaintiffs and their reputation.

As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, the full portrayal implication, imputation and/or insinuatin can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other. Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes seif-evident.

(b-d) See above

(e) Plaintiffs' cause of action arises from an article(s) that appeared in 'THE DETROIT NEWS' as more fully set out in plaintiffs' Complaint. The aforesaid information, upon information and belief, resulted from research and/or investigations initiated and/or performed by the defendants, or on the defendants' behalf. At the present time, plaintiffs have been unable to depose the defendants to ascertain all individuals contacted and/or interviewed by defendants or on defendants' behalf; however, every such individuals is a potential witness to this litigation. Once discovery is completed and a determination has been made as to the individuals to be utilized as witnesses, plaintiffs will promptly inform the defendants of the same.

(f) Documents that may be utilized include any and all newspaper articles presently known to plaintiffs; any and all articles, notes memorandum, reports, "documents" and transcripts compiled by defendants or on behalf of defendants, in regard to these articles and any and all articles that are currently unknown to plaintiffs but may be uncovered through discovery. Other documents may include police reports, notes and/or memorandum which are believed to be in the possession of the appropriate

> agencies. Finally, plaintiffs may utilize any and all documents, notes, memorandum and reports that may be uncovered through discovery, or are unknown to the plaintiffs at this time.[2]

Based on these interrogatory answers, appellants again moved for summary judgment as to plaintiffs' libel claims on the ground that the reports admittedly contained no false statements, and thus appellees could not maintain an action for libel as a matter of law. In opposing this motion, appellees again admitted that each and every statement contained in the news reports was true, but claimed they could go forward because of allegedly false implications and innuendos arising from these admittedly true facts. Judge Borman denied the motion ruling the case could go forward despite the absence of falsity.

On June 1, 1982, defendants-appellants applied to this Court for Leave to Appeal from Judge Borman's ruling. On August 5, 1982, this Court granted the Application for Leave to Appeal and granted the Motion for Immediate Consideration. Defendants-appellants filed their Claim of Appeal on August 17, 1982.

ARGUMENT

It is now apparent that this is not a normal libel case brought to redress published factual misstatements. Rather, this is an action brought to squelch publication period. Plaintiffs admit that what was published contained no factual errors. What plaintiffs don't admit, but which is readily apparent is that their real complaint is that they and their activities and their notorious associations have been the subject of press coverage. They don't want press coverage period — no matter how accurate — because when confronted with the facts the public may draw conclusions

[2] Plaintiffs' answers as to the other eleven articles were identical.

which plaintiffs don't like. Therefore, to stifle further news reports and the public's right to know, plaintiffs have embarked upon this costly litigation and have been permitted to continue it in spite of their admission that the article contained no false statements.

To decide this appeal this Court does not need to plow new legal ground. It seems well settled in Michigan law that there can be no viable libel claim absent false factual statement. It is plaintiffs' burden to plead and prove falsity. Locricchio and Francell have neither pled falsity nor, based on their sworn admissions, can they prove falsity. Their libel claims should be dismissed. Only then will the public's right to be informed be restored and press obligation to inform be vindicated.

PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR LIBEL

A. As a Matter of Michigan Comon Law a Libel Claim Must be Based on False Statements.

Allegation of a false statement is a prerequisite to a libel claim. This Court has recently reaffirmed this long-standing principle of libel law in *Postill, et al.* vs. *Booth Newspapers, Inc., et al.*, _____ Mich App _____ (Docket Nos. 55959, 55990, 55996, August 23, 1982), as follows:

> "To demonstrate liability for defamation, the following elements must be proven: (a) *a false and defamatory statement concerning plaintiff;* (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher and; (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). Restatement of Torts (Second), § 558." (emphasis supplied)

This decision is consistent with repeated decisions of the Michigan courts and courts from other jurisdictions. As an initial proposition, Michigan law requires that the allegation must set forth the specific libelous words complained of; mere conclusory allegations do not suffice. In *DeGuvera* v *Sure Fit Products,* 14 Mich App 201 (1969), the plaintiff's failure to allege libelous words precluded him from stating a libel claim.

> Defendant's motion for summary judgment is filed under GCR 1963, 117.2(1) upon the ground that the amended complaint *does not allege what defamatory words* if any were used by defendant. Citing *MacGriff* v *Van Antwerp* (1950) 327 Mich 200, he claims that a libel complaint must state the alleged libelous words and their publication.
>
> * * *
>
> 'A declaration in an action for libel which fails to show where the alleged libels were published or their contents *failed to state a cause of action for libel.' Mac Griff* v *Van Antwerp, supra.*
>
> 'The law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action.' Gatley, *Law & Practice of Libel and Slander,* (1924 Ed) 467 (emphasis added)

The appellees have the mistaken belief that merely attaching the allegedly "defamatory articles" of some 10,000 words without alleging specific false statements is sufficient to satisfy this requirement. This misconception is the result of their confusion of two separate requirements. First, a plaintiff must prove that a publication is capable of a defamatory interpretation. For this requirement the entire publication is construed as a whole. See generally Prosser, *The Law of Torts* §111 p 739. Secondly, however, once a plaintiff surmounts the barrier of showing that the

publication as a whole is capable of defamatory interpretaion, he must show that there are false statements of fact. Whether a publication is capable of a defamatory interpretation is a threshold question to be determined by the court. Only when they have satisfied these two criteria — a defamatory content and an allegation of a false statement which was published — has a libel plaintiff stated a claim:

> With regard to what must be contained in a complaint alleging libel or slander, the following specifics are stated in 11 Callahan's Michigan Pleading & Practice (2d Ed), §78.09, pp. 256-257, as follows:
>
> 'The essentials of a cause of action for libel or slander must be stated in the complaint, *including allegations as to the particular defamatory words complained of,* the connection of the defamatory words with the plaintiff where such words are not clear or are ambiguous, and the publication of the alleged defamatory words.'
>
> A review of the complaint in the instant case shows that it does not set out the substance of the statements complained of but rather speaks in terms of conclusions. The law is well settled that the mere statement of the plaintiff's conclusions, unsupported by allegations of fact upon which they are based, will not suffice to state a cause of action. *Koebke* v *LaBuda,* 339 Mich 569 (1954). In this case, we find no error in the trial judge's granting of the motion for summary judgment. (emphasis supplied)
>
> *Pursell* v *Wolverine-Pentronix,* 44 Mich App 416, 421-22 (1973).

The requirement that a plaintiff must prove first that there is a defamatory interpretation and then must prove that there is a false statement is also recognized in Devitt and Blackmar's Jury Instructions.

The plaintiff's claim consists of six essential elements, as follows:

First, that the defendant published written statements, as opposed to oral statements;

Second, that the written statements constituted libel as that term is defined to you in these instructions;

Third, that the publication was of and concerning plaintiff;

Fourth, that the publication was communicated to third persons;

Fifth, that the publication was *false in some material particular;* and

Sixth, that the written statements were published with actual malice, as that term is explained in these instructions. [if there is a privileged publication as exists in the instant case.] [emphasis supplied]

3 Devitt and Blackmar,
Federal Jury Practice & Instructions, (3rd Ed)
§84.08 (emphasis added)

In *Orr* v *Argus-Press Co*, 586 F 2d 1108 (1978) the Sixth Circuit reversed the trial court's judgment for the plaintiff. On this case which arose under Michigan Law the plaintiff admitted that "the basic factual statements contained in the story (were) true," but contested the use of inflamatory terms such as "swindle" and "fraud" and "phony scheme." The Court initially addressed the issue of liability when an article is generally true and plaintiff's complaint has not identified any specific falsehood.

First . . . *the article is not libelous if substantially true.* 'To be true, . . . it is not essential that the libel be established in every detail as long as the article contains

> the gist of the truth as ordinarily understood . . . . Neither Orr's complaint nor the opinion of the district court identified any specific factual errors in the article . . . *Id* 1112 (Emphasis added)

By their own admissions in their response to the Fourth Set of Interrogatories, their Complaint, and their Response to Defendants' Motion for Summary Judgment, appellees do not allege any false statement of facts. Rather they allege no more than that the articles are capable of "defamatory interpretation" because of what they believe to be the "implication, imputation and insinuation of the articles." Absent the additional allegation of a false factual statement, Plaintiffs have failed to state a libel claim.

Michigan has long recognized that unless a libel plaintiff alleges *and proves* a false statement there can be no liability. *Edwards* v *Chandler,* 14 Mich 471 (1876):

> Where communication is privileged, the plaintiff can not (sic) recover without proving affirmatively *not only the falsehood of its contents,* but also that it was published with express malice. Unless he can prove both of these points, he must fail. *The falsehood being a necessary part of the case made out by the plaintiff,* the truth is but a contradiction of that case and may be made out under the general issue, . . . without resort to a special plea or notice. Upon this question there seems to be no conflict of authority, and it is in accordance with the general doctrine of pleading that the defendant may deny, under the general issue, whatever the plaintiff is obliged to prove as an essential part of his own case. *Id.* 457 (Emphasis added)

Moreover, the Michigan Supreme Court has refused to recognize a cause of action for libel when the plaintiff merely alleged that the "nature" of certain articles constituted libel but did not allege the statements in the article were indeed false. In *Sanders* v *Evening News*

Association, 313 Mich 334 (1946) the court sustained a summary judgment for defendant based on the plaintiff's inability to allege the falsity of statements in the article.

In *Sanders* Defendants published a newspaper series critical of the practice by some judges of granting overnight releases of persons arrested for misdemeanors. In an introduction to the series, the publication had stated:

> The News offers the series in a constructive effort to end the periodic feuds and scandles [sic] that result from the current system. *Id* 337

The plaintiff was a former judge. His complaint regarding one of the news reports was:

> that on the 27th day of July, 1942, the defendants hereinbefore mentioned falsely and maliciously published of the plaintiff in said article the following words: 'Something always happens to embarrass the police and restore the old telephoned request system, such as the time former Judge Joseph Sanders walked into Bethune station one night, banged his gavel on the startled sergeant's desk and shouted: ' "Court's in session, the Honorable Joseph Sanders presiding. Bring in Joe Doakes!' " *Id* 338, 339.

Plaintiff did not allege that any of the facts in these articles were not true but disputed the implications or "underlying" statements. The basis of his libel claim, like plaintiffs' in the case at bar, was that defendants were liable for the implications, inferences or innuendos arising from the articles.

> [D]efendant by the publication *meant to convey* that plaintiff was guilty of misfeasance, malfeasance and corrupt practices in the office of judge of the common pleas court, and thereby 'maliciously to injure the plaintiff, in his good name, fame, and credit, and to bring him into public scandal, infamy and disgrace, and to

> public scorn, mockery, ridicule and contempt.' *Id* 339 (Emphasis added)

Despite the plaintiff's attempt to couch his falsity requirements in innuendo or implication, the court upheld the lower court's summary judgment because, as it noted, under plaintiff's own pleadings he was not entitled to recovery.

> Our review of this record brings the conclusion that under plaintiff's own pleadings *he is not entitled to recover* in consequence of the publication of July 27, 1942. *This is because* in his amended declaration *plaintiff admits the truth of the July 27th publication* in so far as it could possibly tend to support an action for libel. *Since that publication was true, it was not libelous. Sullings* v. *Shakespeare*, 46 Mich. 408 (41 Am Rep. 166). *Id* 339, 340

Appellees have relied on other quotes from *Sanders* to justify their notion that a libelous action may be pursued by alleging that the articles "as whole" are defamatory. Once again, they have confused the requirement of alleging and proving that an article is "capable of being defamatory" and the requirement of alleging that the article contains factually false statements. It is true that in determining whether an article is capable of being defamatory, the court must construe the article as a whole, but this does not relieve appellees of their additional requirement to identify a false statement of fact in order to sustain a libel claim.

These separate requirements are clearly illustrated in *Hysko* v *Polonia Publishing Co.*, 239 Mich 676 (1972) which was concerned with the translation of published facts alleged to impute the commission of a crime. Because the article may have imputed that plaintiffs had committed a crime, the court noted that words were libelous *per se*. In instructing the jury, however, the lower court refused to grant plaintiff a directed verdict and submitted the question of falsity to the jury.

> The trial court instructed the jury that, no matter which translation was accepted, the article was libelous *per se*. He submitted to the jury Defendant's claim that the article as published, when correctly translated, was a true statement of facts detailed in it, and instructed them that, if they so found, . . . plaintiffs could not recover . . .
>
> . . .
>
> 'In a civil action for libel no damages are recoverable for a libel that contains no falsehood.' Id. 678, 680.

In other words the article may have had a defamatory interpretation and been libelous *per se* if false (that is, entitling plaintiff to recover without proving special damages) but if the underlying statements of fact were not false there could be no action for libel.

This principle was also recognized in *Van Lonkhuyzen* v. *Daily News Co.*, 195 Mich. 283 (1917). In that case, as in this case, the article complained of set forth some statements which were entirely true, but unlike this case also contained a statement which was false. The court rejected the defendant's truth defense because of the element of falsity. In so doing, however, it recognized that one cannot be held liable as consequence of a published statement which is in fact true, regardless of the inference drawn by the reader:

> "It is further urged that, because the facts upon which the libel was based were published and were true in fact, the conclusions therefrom were merely opinions of the defendant and would mislead no one. The case of *Simmons* v *Burnham*, 102 Mich. 189 (60 N.W. 476), and cases from other jurisdictions, were cited to sustain this viewpoint. In these cases, however, the facts were stated without any further comments, and *it was said that*, merely because *the truth as stated was liable to suggest damaging inferences, it did not make the state-*

ments libelous. In *Simmons* v *Burnham, supra,* the court said:

> " 'There is nothing better settled in this State than the proposition that the truth of the publication is a complete defense to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because use of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defense in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by defendant that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the defendant from liability? *We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences.*"
>
> (p 295, emphasis added)

Two other jurisdictions have held that a libel claim based totally on "false implication or innuendoes" and not on any allegations of false statements of fact do not constitute a cause of action for libel. Under the guidance of U.S. constitutional law, the Supreme Court of Louisiana in *Schaefer* v *Lynch,* 406 So 2d 185 (1981) unequivocally held that a plaintiff could not recover damages for defamation where the article was factually correct despite allegations of a false and defamatory implication. The trial court had denied a summary judgment motion on the ground that the words, even if true, might have a defamatory imputation. After the Louisiana Court of Appeals declined a writ of review, the State Supreme Court granted the writ. In ruling against the Defendant's motion, the lower court had noted that the article conveyed the impression that the plaintiff used his official position to influence lending institutions for

the benefit of his real estate investment. It also noted that an affidavit had stated that the reporter was motivated by ill-will. Despite his allegation of falsity, the plaintiff had admitted nothing was factually incorrect in the article, but that "the way people looked at the thing" he was accused of misusing state funds for his personal benefit. *Id* 188. The Louisiana Supreme Court also acknowledged that there was evidence of malice and ill-will on the part of the reporter, but nevertheless dismissed the claim.

> Malice in the sense of *New York Times* v *Sullivan* . . . requires publication of falsehoods with knowledge of their falsity or reckless disregard of their truth or falsity.
>
> The article is defamatory in the sense that it tends to diminish the public's respect for plaintiff. The defamatory meaning is insinuated. When truthful statements carry a defamatory innuendo, the implication should also be true to justify publication (cite omitted.) Nonetheless, the publication of true statements is generally encouraged even if published . . . for no good reason or for the worst possible motive. . . . The United States Supreme Court has established that there is no liability for publication of the truth about public officials regardless of motive. . . . It surely follows that all truthful statements are also constitutionally protected. *Even though a false implication may be drawn by the public, there is no redress for its servants. Where public officials and public affairs are concerned, there can be no libel by innuendo. Id* 188 (emphasis added)

It is significant to note in this case, that the Supreme Court of Louisiana based its decision on the First and Fourteenth Amendments, not the interpretation of its own state's statutes.

Plaintiffs' basis for a libel claim was also rejected by the Court of Appeals of Massachusetts in *Mihalik* v *Duprey*,

417 NE 2d 1238 (Mass App 1981), where an elected school board member made a similar argument. The Plaintiff alleged libel in a newsletter which presented a "riddle" with questions regarding the Plaintiff, such as "which elected city official doesn't live within . . . the ward from which he was elected [and] . . . is having the Trade School make furniture for him." Defendant admitted that he intended the riddle to refer to Plaintiff, but raised as his defense the truth of all statements in the riddle. The plaintiff claimed that the statements made a false implication. The Court of Appeals dismissed the case:

> Before there can be defamation of a public officer there must be a false statement of fact. . . . 'The *sine qua non* of recovery for defamation . . . is the existence of a falsehood.' . . .
>
> The Massachusetts courts, in applying the *New York Times* case, have referred in strong general terms to the requirement that an allegedly defamatory statement be shown to be false . . . 'An assertion that cannot be proved false cannot be held libelous.' . . . So long as the critic excludes false statement of fact from his arsenal, the Constitution will shield him.
>
> * * *
>
> The purposes (of not stifling discussion protected under the First Amendment) of the *New York Times* rule would not be served by permitting recovery for the statement here in issue. ***We think that their falsity . . . has not been established merely because in the aggregate they have an insinuating overtone.***
>
> *Id* 1240-1241.

Appellees claim is that there can be libel by implication. This is true only if the inference or implication *as well as the published statements* are in fact false. They have conceded that the published statements are not false. They have no claim.

The Appellees have relied on *Caldwell* v *Crowell-Collier Publishing Co*, 161 F 2d 333 (5th Cir 1947). Reliance on that case is misplaced because the case was on appeal from a dismissal on the face of the complaint. Therefore the only issue was whether the complaint stated a cause of action for libel. As has been previously discussed in addressing the issue of whether the words are actionable, that is capable of a defamatory interpretation, it is required to view the article as a whole, including any implications or innuendos arising therefrom. It was clearly in this sense that the Court defined "libel" to include false implications and innuendos. However, the court in *Caldwell* was not required to then address the issue of factual falsity of the specific statements in the complained of article. Therefore, nothing in that opinion is relevant to the narrow issue presented in this case.

Finally, appellees have previously cited *Steadman* v *Lapensohn*, 408 Mich 50 (1980). That case reversed a summary judgment for defendant because the trial judge improperly made findings of fact in ruling on the motion. That case is simply not applicable here. The plaintiffs in *Steadman* contended that defendant's articles and editorials were false and defamatory. Moreover, not only did plaintiffs allege that several of the *published statements* were false, but they supported their claim with affidavits.

B. As a Matter of Federal Constitutional Law a Libel Claim Must be Based on False Statements.

This country is perhaps unique in its long standing commitment to vigorous and uninhibited debate on public issues. In recognition of this policy, the United States Supreme Court and other courts have consistently ruled that there is no such thing as a false idea or a false opinion and that the Constitution guarantees that a publisher can be successfully sued—either civilly or criminally—only where he has published a knowingly false statement of fact. The Constitution guarantees this commitment to uninhibited and

vigorous debate and does not permit one person to hold another person liable for ideas, opinions or implications that are based on facts.

Specifically relevant to this case, the U.S. Supreme Court has held that absent showing a false statement of facts in an article, mere "ideas", pejorative terms, or inferences which may or may not be false are insufficient to establish a cause of action for libel.

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974):

> "We begin with the common ground. Under the First Amendment, there is no such thing as a false idea. However, [sic] pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of ideas." *Id* 339-340.

The court noted that although there is "no constitutional value in false statements of fact, courts must be extremely cautious in applying sanctions simply for an erroneous statement."

> "Punishment of error runs the risk of inducing a cautious and restricted exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels the publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id* 340.

The court then again noted the tension that existed between the need for a "vigorous and uninhibited press and the legitimate interest in redressing wrongful injury" to one's reputation.

> "In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure the freedom of speech and press that 'breathing space' essential to their fruitful exercise." *Id* 342.

This reasoning was applied in *Wilson* v *Scripps-Howard Broadcasting Co*, 642 F 2d 371 (6th Cir.), *cert granted*, 704 L Ed 377 (1981), where the court noted that falsity was an essential element of a libel claim. In reversing the lower court's application of state law which placed the burden of establishing the truth of the statement on the defendant, the Sixth Circuit discussed the requisite elements of a libel action.

> The Supreme Court in stating that 'demonstration that an article was true would seem to preclude finding the publisher at fault,' . . . has suggested that falsity is the element of fault in defamation cases. *Id* ____

The court was concerned with placing liability on a defendant without plaintiff ever being able to establish that the statements were indeed false.

> [A] rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. '[W]hen the trier of fact is unable to determine the truth or falsity of a proposition of facts, he must render his decision against the party having the burden of proof. Consequently, in a jury trial the judge by allocating the burden of proof decides each issue of fact which the jury is unable to decide.'
>
> . . .
>
> The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. *Falsity is an element of fault under the First Amendment that should be proved and not presumed. Id* ____

Appendix G

In *Orr* v *Argus Press*, 586 F 2d 1108 (6th Cir 1978), the court discussed at length when an opinion may serve as the basis for a libel action. In that case, the court found that the reporter had accurately reported the underlying facts concerning the plaintiff's indictment and arrest and that the only grounds for the libel action were defendant's words characterizing plaintiff's actions as "swindle," "fraud" and "phony schemes". The court noted approvingly that under the rule adopted by the American Law Institute in the Restatement, following the *Gertz* opinion, there can be no cause of action for the use of these words.

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegations of undisclosed defamatory facts as the basis of the opinion. . . .
>
> It is the function of the court to determine whether the expression of opinion is capable of bearing a defamatory meaning, because it may reasonably be understood to imply the assertion of undisclosed facts which justify the expressed opinion about the plaintiff or his conduct . . . Restatement (Second) of Torts, §566 (1977) *Orr* v *Argus Press*, 1114.

The court reversed the jury findings that the newspaper had acted with malice in publishing the article. First, it stated "we believe that most, if not all, the reports on Orr are substantially truthful and therefore not actionable."

> Neither Orr's complaint nor the opinion of the district court identified any specific, factual errors in the article . . . While the words 'swindle' may imply more serious wrongdoing than was involved here, the word is frequently used in colloquial speech as a substitute for 'fraud' . . . Although the word also connotes bad motive and an intent to defraud, the story as a whole sets forth

> sufficient facts concerning the circumstances of Orr's indictment and arrest for the reader to draw his own conclusions as to Orr's motives. *Id* 1112.

It is clear from this, that the Sixth Circuit held that once a reporter sets forth the facts upon which he bases his opinion or implication, or from which a reader may draw his own conclusions or inferences, there can be no cause of action for libel unless the facts are false.

The Constitution therefore recognizes that there cannot be a liability for an opinion at least as long as that opinion is based upon disclosed true facts. The same constitutional reasoning protects an implication made by a publisher or an inference drawn by a reader. If the factual reporting is not false, then the public has the information from which it may draw any number of inferences or which it may use to contest or question what it perceives as the publisher's implications. In short, if the facts are not false, the "competition of ideas" referred to in *Gertz* begins and the constitutional guarantees are intact.

CONCLUSION AND RELIEF REQUESTED

The requirement that a putative libel plaintiff set forth the specific statements he claims to be false is not simply a pleading requirement. It is one of the essential elements in our system's commitment to preserving free speech and free press.

Herein the plaintiffs have belatedly admitted that the articles sued upon contain no false statement of fact but nonetheless insist they have a right to continue their libel claims because a reader may have drawn conclusions that plaintiffs do not like. Their claims are belied by both Michigan Common Law and the United States Constitution. It is the plaintiffs' burden to plead and prove falsity as well as possible defamatory interpretation. Locricchio and Fran-

cell admit they cannot prove falsity and thus their libel claims must be dismissed. To do otherwise would permit them to continue to chill speech with costly litigation over statements not claimed to be false.

BUTZEL LONG GUST KLEIN & VAN ZILE
A Professional Corporation
By: Richard E. Rassel (P19243)
By: James E. Stewart (P23254)
1881 First National Building
Detroit, Michigan 48226
Telephone: (313) 963-8142

Attorneys for Defendants

Dated: October 18, 1982

Appendix G

STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,
Plaintiffs-Appellees,

vs.

THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM, Jointly and Severally,
Defendants-Appellants.

Court of Appeals No. 64729
Wayne Circuit Court No. 80-012-415-CZ
Hon. Susan D. Borman

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

JoAnn K. Steiner, being duly sworn, says that she is a person of suitable age and discretion to serve process, and that on the 18th day of October, 1982, she served a copy of Appellants' Brief on Appeal upon Jeremiah J. Kenney, 2000 Buhl Building, Detroit, Michigan 48226, by enclosing said copy in an envelope addressed to said attorney, sealing said envelope and depositing same, with postage thereon fully prepaid, in a United States mail receptacle located in the First National Building, Detroit, Michigan.

(s) JoAnn K. Steiner

Subscribed and sworn to before
me this 18th day of October, 1982.
(s) Loretta A. DiMarco
Notary Public, Wayne County, Michigan
My commission expires September 30, 1985

APPENDIX H

STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH JUDEUS LOCRICCHIO
and GARY FRANCELL,
Plaintiffs-Appellees,

v. Case No.

THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM, Jointly and Severally,
Defendants-Appellants.

Lower Court No. 80-012415 CZ
Court of Appeals No. 64729

APPLICATION FOR LEAVE TO APPEAL

Pursuant to GCR 1963, 853.1, defendants apply to this court for leave to appeal from the decision of the Court of Appeals dated August 24, 1983 as to which the Court of Appeals denied rehearing on October 24, 1983.

I.

CONCISE STATEMENT OF PROCEEDINGS AND FACTS

1. The Evening News Association publishes The Detroit News. Defendant Giles was the Editor and Vice-President of The Detroit News. The remaining defendants are reporters, staff writers and columnists for The Detroit News.

2. Plaintiffs, along with several businesses and corporations which they control, are the developers and primary operators of the nationally famous Pine Knob Entertainment Complex. During the course of their public careers, the plaintiffs have been investigated by the United States Justice Department, associated with and done business with convicted felon and racketeer James Tamer, subpoenaed to testify to at least one federal grand jury concerning that Aladdin Hotel in Las Vegas, and indicted by a United States Organized Crime Strike Force Grand Jury and pled guilty to lesser charges in that indictment.

3. As the plaintiffs were developing Pine Knob, the News Defendants and other media reported on criminal proceedings involving these plaintiffs, their efforts and attempts to find financing for Pine Knob, their involvement with the Aladdin Hotel in Las Vegas, and their business and personal associations with convicted felons and identified organized crime figures.

4. On April 3, 1980, the plaintiffs filed suit based on eleven of these Detroit News' reports, which were published over a period ranging from April 27, 1977 through April 25, 1979, and containing over 10,550 words. The news reports were attached to plaintiffs' Complaint. An Amended Complaint was filed on or about March 17, 1982. The original Complaint and the Amended Complaint alleged that the news reports complained of charged plaintiffs with criminal conduct or conduct of an immoral or reprehensible nature. Neither the original Complaint nor the Amended Complaint set forth the statements in the eleven News' reports upon which plaintiffs base their ten-count Complaint.

5. Counts One through Three of Plaintiffs' First Amended Complaint are libel claims against all the News Defendants, and it is only these claims which are the subject of this Application for Leave to Appeal. The remaining claims are dependent on the libel claims.

6. Throughout the entire course of the proceedings in the trial court, defendants made repeated efforts to discover what statements, if any, in these publications plaintiffs claim to be false. Specifically, defendants initially moved for summary judgment *inter alia* on the ground that plaintiffs' original Complaint failed as required by Michigan defamation law to set forth the falsified defamatory statements complained of. The Wayne County Circuit Court, the Honorable, Susan D. Borman denied this motion. Defendants then filed three sets of Interrogatories requesting that as to each statement in three of the complained of news reports, plaintiffs answer whether that statement was claimed to be false. Judge Borman ruled that such Interrogatories were not permissible. Finally, defendants filed a Fourth Set of Interrogatories requesting plaintiffs to identify which statements they contended were false statements of fact.

7. After plaintiffs' objections to this Fourth Set of Interrogatories were denied by Judge Borman, plaintiffs answered that they did not base their libel claims on any false statement of fact in the ten thousand plus words contained in The Detroit News' publications. Rather, plaintiffs answered that they based their libel claims on the allegedly false portrayal, implications, imputations or insinuations allegedly arising from the admittedly true statements. Their exact answer read in relevant part as follows:

> In regard to Interrogatory 1(a), plaintiffs Joseph Judeus Locricchio and Gary Francell, state that they have been advised by their attorneys that the defamation allegations contained in said Complaint *are not necessarily based on a false statement(s)* in any one particular article, but rather, that the entire series of articles as the same represented a false *portrayal, implication, imputation* and/or *insinuation* that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise

known as the "Mafia"; individuals knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature. (emphasis added)

8. Based on plaintiffs' responses to the Fourth Set of Interrogatories, defendants moved for summary judgment as to the libel claims on the ground that there was no issue of any material fact that the statements complained of were true, and thus plaintiffs could not maintain an action for libel as a matter of law.

9. Plaintiffs resisted this summary judgment motion on the ground that the allegedly false implications and innuendos arising from the publications in question would support their libel claims, although they were not alleging the falsity of any of the underlying statements of fact.

10. Judge Borman, ruled for plaintiffs and denied defendants' Motion for Summary Judgment.

11. By its Order of August 5, 1982, the Court of Appeals granted defendants' Application for Leave to Appeal to that Court and heard oral arguments. By its Order dated August 24, 1983, the Court of Appeals denied defendants' appeal and by Order of October 24, 1983, denied defendants' Motion for Rehearing. It is from the Order of the Court of Appeals denying defendants' appeal and that defendants seek leave to appeal to this court.

II.

THE REASONS FOR THIS COURT TO HEAR THIS APPEAL NOW

1. The effect of this decision of the Court of Appeals extends well beyond this libel action against The Detroit

News. Its affects the free speech rights of every citizen of Michigan. It says that every speaker on every subject is responsible in libel for every innuendo, implication and insinuation any listener might attach to his speech EVEN THOUGH THE SPEAKER PUBLISHED NOTHING BUT TRUE AND ACCURATE FACTS. The decision of the Court of Appeals is clearly erroneous. It chills the speech rights of every citizen of this State and patently involves legal principles of major significance to the jurisprudence of the State.

2. The decision of the Court of Appeals holding that a plaintiff may maintain a libel action after conceding that no factual statement published by defendant was false is contrary to this Court's repeated and unanimous decisions and is contrary to the Standard Jury Instructions for Libel recently adopted by this Court's Committee for Standard Jury Instructions.

3. The decision of the Court of Appeals permitting plaintiff to continue a libel action asserting claims not over what was published but rather over unpublished but claimed false implication, insinuation, innuendo and inference deprives the citizens of this state of their guaranteed Constitutional Speech Rights.

4. The citizens of this state as well as the defendants in this case will suffer harm by being required to await final judgment because in the interim this decision will severely chill Constitutionally guaranteed Free Speech in the state by subjecting the publishers of true and accurate facts to libel suits based on unpublished but claimed erroneous implications arising from the published facts.

WHEREFORE, defendants respectfully request that this court grant its Application for Leave to Appeal.

Appendix H

This application is based on the files and records herein and the a supporting brief filed herewith.

Respectfully submitted,

BUTZEL LONG GUST KLEIN & VAN ZILE
A Professional Corporation
By: (s) Richard E. Rassel (P19243)
By: (s) James E. Stewart (P23254)
By: (s) Gordon J. Walker (P34468)

1881 First National Building
Detroit, Michigan 48226
Telephone: (313) 963-8142

Attorneys for Defendants

Dated: November 14, 1983

Appendix H

STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH JUDEUS LOCRICCHIO
and GARY FRANCELL,
Plaintiffs-Appellees,

v. Case No.

THE EVENING NEWS ASSOCIATION,
INC., a Michigan corporation,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
ROBERT ANKENY and JIM GRAHAM,
Jointly and Severally,
Defendants-Appellants.

Lower Court No. 80-012415 CZ
Court of Appeals No. 64729

BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL

BUTZEL LONG GUST KLEIN § VAN ZILE
A Professional Corporation
By: Richard E. Rassel (P19243)
By: James E. Stewart (P23254)
By: Gordon J. Walker (P34468)
1881 First National Building
Detroit, Michigan 48226
(313) 963-8142

Attorneys for Defendants-Appellants

Appendix H

TABLE OF CONTENTS

	Page
Table Of Authorities	53a
Question Presented	54a
Concise Statement Of Facts	55a
Argument	55a
Introduction	55a
The Uncontradicted Michigan Law	58a
The Non-Michigan Authority Cited In The Court of Appeals' Decision Is Inapplicable To This State's Law Or To This Case	71a
It Is An Unconstitutional Infringment On First Amendment Freedoms For A Publisher To Be Held Liable For Defamation Without Allegation And Proof Of Factual Falsity	74a
Conclusion And Relief Requested	78a

Appendix H

TABLE OF AUTHORITIES

Cases: Page

Caldwell v *Crowell-Collier Publishing Co*, 161 F2d 133 (5th Cir 1947) 71a, 72a, 73a

Gaynes v *Allen*, ___ Mich App ___ (No. 61172, August 16, 1983) 67a, 68a

Gertz v *Robert Welch, Inc*, 418 US 323 (1974) 57a, 75a, 76a, 77a

Kenney v *Hatfield*, 351 Mich 498 (1958) 65a, 66a

Memphis Publishing Co v *Nichols*, 569 SW2d 412 (Tenn 1978) 71a, 74a, 75a

Miranda v *Arizona*, 384 US 436 (1966) 72a

Orr v *Argus-Press*, 586 F2d 1108 (6th Cir 1978) 76a, 77a

Postill v *Booth Newspapers*, 118 Mich App 608 (1982) 66a, 68a

Sanders v *Evening News Association*, 313 Mich 334 (1946) 58a, 59a, 60a

Simons v *Burnham*, 102 Mich 189 (1894) 61a, 62a, 63a, 77a

Van Lonkhuyzen v *Daily News Co*, 195 Mich 238 [sic] (1917) 63a, 64a, 65a, 77a

Wilson v *Scripps-Howard Broadcasting Co*, 642 F2d 371 (6th Cir 1981) 72a, 74a, 75a

Secondary Authority:

50 Am Jur 2d, Libel and Slander §13 ..... 73a

Black's Law Dictionary (Rev 5th Ed 1979) 66a

Prosser, Torts (4th Ed 1971) §111 ..... 73a

SJI2d 118.01 Libel: Definition 69a, 74a

SJI2d 118.05 Libel, Slander: Burden of Proof 69a, 70a, 74a

Appendix H

QUESTION PRESENTED

AS A MATTER OF LAW, MAY A LIBEL SUIT CONTINUE WHERE AFTER TWO YEARS OF DISCOVERY PLAINTIFFS ADMIT THAT THE 10,000 PLUS WORD SERIES OF NEWS REPORTS SUED UPON CONTAINS NO FALSE STATEMENTS OF FACT?

The Court of Appeals held: "YES."

Defendants-Appellants contend that the answer is: "NO."

Appendix H

CONCISE STATEMENT OF FACTS

The facts pertinent to this case and this brief are set forth in the accompanying Application under the title "Concise Statement of Material Facts and Proceedings".

ARGUMENT

INTRODUCTION

The Court of Appeals' decision which defendants seek to have this Court review holds that any citizen who publishes only true and accurate facts will be responsible in a libel action for any conclusions which any reader or listener draws from those true and accurate facts. Put another way, the Court of Appeals' decision holds that the right of free speech in this state does not protect citizens who publish only true facts. This Court's help is needed immediately to preserve the right of free speech in this state.

The Court of Appeals' decision relates to a libel involving news reports containing more than 10,000 words published by The Detroit News. Plaintiffs concede the news reports to be factually accurate.[1] Rather, than attacking the facts reported, plaintiffs seek to and have been permitted to proceed with respect to unpublished implications which they claim arise from the facts reported and which they find objectionable.

Moreover, in the recently filed Plaintiffs' Response In Opposition To Defendants' Motion For Rehearing at page 11, plaintiffs state, "Proofs of the false nature of the implications . . . will be submitted at trial." With the Court of

[1] For example, they do not claim that they were not indicted by a United States Organized Crime Strike Force Grand Jury or that they later pled guilty to a lesser charge; they do not deny close association with convicted felon and racketeer James Tamer; they do not deny that they took a $200,000 cash loan from one William Magill to Toronto to hide Magills participation in their financing nor do they deny that Magill's sister-in-law/bookkeeper was murdered shortly thereafter.

Appeals' blessing, there is to be an extended trial, not over facts published by The Detroit News, but over what the plaintiffs claim those facts might be interpreted to mean. Further, The Detroit News is not to be told what the claimed false implications are until the trial.

To say the least, these propositions have a direct, chilling effect on the First Amendment rights of The Detroit News. However, the decision's threat to fundamental First Amendment rights extends much further and cuts much deeper than this case or these parties. Until this decision is corrected, citizens of this state cannot write or say anything and be secure in the belief that as long as they have limited themselves to true and accurate facts they cannot be sued. Until this decision is corrected, any citizen of this state who does print or speak only true and accurate facts is liable to suit over whatever meaning anyone else might attribute to those true facts.

Certainly any citizen can and should be held responsible for the accuracy of the factual material it publishes—be it a manager discussing a subordinate's job performance; a parent discussing a teacher's classroom conduct; or a newspaper reporting on financial transactions, criminal convictions and business associations of a major commercial entity in this state. However, these citizens cannot be held responsible for the unknown implications, inferences or innuendos which different listeners might draw from these accurate facts. To hold citizens responsible for such implications, inferences or innuendos is to hold them responsible not for what they have said, but for what some other person thinks that these accurate facts mean. Such a notion violates guaranteed First Amendment rights and violates fundamental notions of fairness. Unfortunately this is exactly what the Court of Appeals' opinion permits. Every citizen of this state who seeks to exercise his right of free speech is chilled by this decision. Review of this chilling decision cannot and should not await the conclusion of the

trial in this case and yet another trip through the appellate courts. The fundamental error made by the Court of Appeals will infect not only the trial in this case but in other cases as well. Worse, legitimate speech will be silenced out of fear over suits relating solely to unpublished implications.

This Court of Appeals decision is wrong as a matter of Michigan law. It is contrary to long-established and unanimous decisions of this Court requiring that a plaintiff prove not only that the publication was defamatory, i.e. tended to harm the plaintiff's reputation, but also that the publication contained false statements of fact. This law has been reaffirmed in the recent adoption by this Court's Committee on Standard Civil Jury Instruction of standard jury instructions for libel actions.

Additionally the Court of Appeals' decision is wrong as a matter of federal constitutional law. It effectively destroys guaranteed First Amendment rights in this state. First, by not requiring that a libel plaintiff prove factual falsity, the Court of Appeals' decision deprives citizens of this state of their guaranteed First Amendment rights. As a matter of United States Constitutional Law, a statement that is not false may not be the basis of a libel suit. Furthermore, the United States Supreme Court has specifically ruled in *Gertz* v *Robert Welch, Inc,* 418 US 323, 339-40 (1974) that "Under the First Amendment there is no such thing as a false idea." Therefore, since implications, inferences and innuendos are at most ideas or unexpressed opinions, no plaintiff can meet his constitutional burden of falsity by claims of such false "ideas."

The second way in which the Court of Appeals' opinion destroys guaranteed First Amendment rights in this state is illustrated by the constitutional protection for expressions of opinion. Federal constitutional law requires that an opinion, no matter how defamatory that opinion may be, is not actionable if based upon disclosed facts that are true. Cer-

tainly, then, a defendant who limits himself to publication of true facts but states no opinion based on these facts cannot be liable for implications, inferences and innuendos, no matter how damaging, which a reader (or the plaintiffs) might draw from those true facts. In other words, even if The Detroit News had actually expressed as written opinions the very implications, inferences and innuendos claimed by plaintiffs, there would be no liability as a matter of federal constitutional law.

THE UNCONTRADICTED MICHIGAN LAW

There is not a single case of Michigan common law that has permitted a plaintiff to recover in libel action in which the published facts were conceded to be true no matter what implication or inference or innuendo the plaintiff claimed that the true facts might have. A close reading of *Sanders* v *Evening News Association*, 313 Mich 334 (1946), illustrates this very point.

In that case, defendants published a newspaper series critical of the practice by some judges of granting overnight releases of persons arrested for misdemeanors. In an introduction to the series, the publication had stated:

> "The News offers the series in a constructive effort to end the periodic feuds and scandals that result from the current system."
>
> (p 337)

The plaintiff was a former judge. His complaint regarding one of the news reports was:

> "that on the 27th day of July, 1942, the defendants hereinbefore mentioned falsely and maliciously published of the plaintiff in said article the following words: 'Something always happens to embarrass the police and restore the old telephoned request system, such as the

time former Judge Joseph Sanders walked into Bethune station one night, banged his gavel on the startled sergeant's desk and shouted: ' "Court's in session, the Honorable Joseph Sanders presiding. Bring in Joe Doakes!" ' "

(pp 338-339)

Plaintiff did not allege that any fact in this article was false but disputed the implications or "underlying" statements that he was somehow acting improperly. The basis of his libel claim, like plaintiffs' in the case at bar, was that defendants were liable for the implications, inferences or innuendos arising from the true facts. He stated his claim as follows:

"[D]efendant by the publication *meant to convey* that plaintiff was guilty of misfeasance, malfeasance and corrupt practices in the office of judge of the common pleas court, and thereby 'maliciously to injure the plaintiff, in his good name, fame, and credit, and to bring him into public scandal, infamy and disgrace, and to public scorn, mockery, ridicule and contempt.' "

(p 339, emphasis added)

Despite the plaintiff's attempt to couch his falsity requirements in innuendo or implication, the court upheld the lower court's summary judgment because, as it noted, under plaintiff's own pleadings he was not entitled to recovery.

"Our review of this record brings the conclusion that under plaintiff's own pleadings he is not entitled to recover in consequence of the publication of July 27, 1942. This is because in his amended declaration plaintiff admits the truth of the July 27th publication in so far as it could possibly tend to support an action for libel.

Since that publication was true, it was not libelous. Sullings v. *Shakespeare*, 46 Mich. 408 (41 Am Rep. 166)."

(pp 339, 340)

Put very simply the plaintiff in *Sanders* had held court as reported in the Detroit News. He therefore had no libel claim no matter what implication, inference or innuendo could be drawn from that fact.

In its decision, the Court of Appeals relies on the statement by the *Sanders* court that " 'To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " This is certainly correct insofar as when assessing the defamatory nature of a publication, i.e. did it tend to lessen the plaintiff's reputation, the Court should consider the publication as a whole including any inference or implications or innuendo. The plaintiff in *Sanders was over this hurdle by his allegation that the publication as a whole meant to convey that he was guilty of misfeasance and malfeasance in office*. Certainly the implication, inference or innuendo of a report that a judge was holding court in the police station for certain favored people was one that could have an implication, inference or innuendo indicating that he was guilty of some misfeasance or malfeasance or corrupt practice and would tend to harm his reputation. By the same token, a report on the factual activities of the developers of the Pine Knob Complex might well lead to an implication, inference or innuendo that they were somehow connected with organized crime. Nevertheless, just as the judge-plaintiff in *Sanders* could not recover no matter what the implication, inference or innuendo because he conceded that the underlying facts (i.e. that he had held court as reported) were true, these plaintiffs likewise cannot recover because they have conceded that there is no false statement of fact in The Detroit News reporting.

Appendix H

In *Simons* v *Burnham*, 102 Mich 189 (1894), the plaintiff and defendant were rival merchants in Lansing. The basis for plaintiff's libel action was succinctly stated by the Supreme Court as follows:

> "[I]n October, 1889, the defendant sent to various firms in other cities, with whom the plaintiff had business relations, clippings from a Lansing paper, showing real-estate transfers, including between ink lines, placed there by himself, the following: 'Benjamin F. Simons to Adeline A. Simons, lots 1, 2, and 3, block 150, Lansing, $5,000.' This clipping was attached to a half sheet of paper, on which was written the following, viz. (after the above quotation from the clipping, the words, 'his wife,' and: 'The real estate transferred and marked in slip is estimated to be worth at least $10,000; other real estate heavily mortgaged; reported to be heavily indebted to three of four banks, for borrowed money, at a high rate of interest, say 8 to 10 per cent. per annum, and payable every 60 days.' In one instance it is claimed that to a clipping of the kind mentioned, inclosed by ink lines as aforesaid, the following pencil writing was appended, viz.: 'In time of peace, prepare for war.' "
>
> (p 191)

Although the plaintiff conceded that the facts published by defendant were true, he alleged that he should be permitted to continue his libel action because the implication, inference and innuendo of these true facts was "that the said plaintiff was fraudulently conveying his property to his wife, and was insolvent, and in failing circumstances, and unreliable, and unworthy of credit" (p 192). This Court recognized this claim that "The innuendo charges defendant with meaning that plaintiff was fraudulently disposing of his property, was in failing circumstances, and unworthy of credit." (p 193). Certainly the publication of these true facts could lead to that implication, inference or innuendo. Nevertheless, this Court ruled that in those publications in

which defendant reported only on concededly true facts, there could be no liability for defamation no matter what implication, inference or innuendo might have been drawn from those true facts. Indeed, it was only the publication to which defendant added the warning "In time of peace, prepare for war" that the Supreme Court would have permitted to go to the jury.

> "There is nothing better settled in this State than the proposition that the truth of the publication is a complete defense to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defense in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by defendant that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the defendant from liability? We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences (Townsh. Sland. & L. § 133), though we must recognize a distinction between inferences which are the natural result of implications contained in the language of the publication—which may, in a sense, render it ambiguous, and justify a construction at variance with the strict meaning of the words as ordinarily used—and inferences drawn only from the facts themselves. In the former case the action may lie, — not because of the inference, but by reason of the implication; in the latter it will not. Applying this rule to the case before us, we feel constrained to say that these words are not susceptible of the construction alleged in the innuendo.

From what has been said, the third count should be excepted. In that count the charge consisted of the real-estate transfer, followed by the words, 'In time of peace, prepare for war.' The statement of the paper was true as to the transfer. If the writing was libelous, it must be by reason of the use of the words, 'In time of peace, prepare for war.' The natural meaning of this will depend largely on the circumstances under which the words were written, and, unless we can say that they do not contain an intimation that the plaintiff was in failing circumstances or unworthy of credit, it was proper to leave this question to the jury."

(pp 197-198)

In *Van Lonkhuyzen* v *Daily News Co.*, 195 Mich 283 (1917) this Court reiterated its position from *Simons* that as long as a publisher limits himself to true facts, he is not liable for the implications, inferences and innuendoes from those true facts. In *Von Lonkhuyzen* the plaintiff was a German minister in Grand Rapids who, in the years just prior to American involvement in World War I, published in his church newspaper several articles and a letter he had sent to President Woodrow Wilson all critical of U. S. foreign policy toward Germany. In response, the Daily News Company published an article critical of plaintiff in which it accurately reported plaintiff's actions, and that he was not an American citizen and had not even applied for naturalization papers. The defendant's article concluded by referring to plaintiff as "an interloper, a meddler and a spreader of distrust, discontent and sedition". This language was the basis of the plaintiff's libel action against the Daily News Company. (p 292) This Court held that had the Daily News Company reported only the true facts and left any inferences as to plaintiff's loyalty or sedition or lack thereof to be drawn by the reader, the case would not have been permitted to go to the jury.

"It is further urged that, because the facts upon which the libel was based were published and were true in fact, the conclusions therefrom were merely opinions of the defendant and would mislead no one. The case of *Simons* v. *Burnham*, 102 Mich. 189 (60 N. W. 476), and cases from other jurisdictions, were cited to sustain this viewpoint. In these cases, however, the facts were stated without any further comments, and it was said that, merely because the truth as stated was liable to suggest damaging inferences, it did not make the statements libelous. In *Simons* v. *Burnham, supra*, the court said:

> " 'There is nothing better settled in this State than the proposition that the truth of the publication is a complete defense to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defense in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by defendant that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the defendant from liability? We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences.'

"In the case before us, the publishers were not satisfied to state the facts and allow the readers to draw their own conclusions, but followed it up by making the libelous statement for the very purpose, as admitted, to hold him up to scorn and ridicule. While the question of whether or not the limits of fair criticism have been transcended may sometimes be a question of law, ordi-

narily it is a question of fact for the jury, and we are satisfied that under all the facts and circumstances of this case the question of justification became one of fact for the jury to determine."

(pp 295-296)

In *Kenney* v *Hatfield*, 351 Mich 498 (1958), the plaintiff was a person whom defendant, a probate court judge, had committed to a mental institution. This commitment later became an issue when defendant ran for circuit judge. The defendant published his version of this commitment in a political advertisement stating that he had committed plaintiff because "numerous complaints were said to be on file against Kenney in the Benton Harbor Police Department indicating that he had been frightening women . . . ." (p 501). The plaintiff's libel action followed. The Supreme Court conceded that this statement was libelous per se in that it imputed impairment of mental facilities. (p 512) However, this Court ruled that because the statements were in fact true, the plaintiff had not stated a claim for defamation even though he claimed that these true facts somehow implied that he had acted illegally and improperly.

"This record discloses no denial by the plaintiff of the conduct recited in these complaints [on file with the police]. On the other hand, it does disclose plaintiff's legal argument which assumes the truth of the facts disclosed therein, vigorously disclaiming that the conduct referred to in the complaints was illegal or that it demonstrated any improper motive on the part of plaintiff."

(p 511)

* * *

"We believe that the record in this case at the close of plaintiff's proofs contained ample evidence to justify

his dismissal of the cause of action as to all defendants on the grounds that the factual allegations were true, . . ."

(p 514)

The opinions of this Court cited above consistently have required plaintiffs to prove that published factual statements are false. These plaintiffs have attempted to disguise their inability to identify false factual statements in the complained of publications by defining the word "statement" in a curious fashion. For example, in their Brief In Support Of Plaintiffs' Response In Opposition To Defendants' Motion For Rehearing at page 3, they state:

"[D]efendants continue to ignore the common usage of the word 'statement', communication creating an impression . . ."

Just as plaintiffs would attempt to create liability for true and accurate publications by creating their own "implications" and "insinuations" they now create their own "common" definitions of the word "statement." The word "statement" has a more concrete meaning than that. *Black's Law Dictionary* 1263 (Rev. 5th Ed. 1979) defines "statement" as:

"In a general sense, an allegation; a declaration of matters of fact."

It is the truth or falsity of the "declaration of matters of fact" that the publications of defendants must be judged by, not the "impressions" of the plaintiffs.

In its recent decision in *Postill* v *Booth Newspapers*, 118 Mich App 608, 618 (1982), the Court of Appeals adopted the Restatement requirement that a plaintiff must prove that a complained of publication is false *and* defamatory. The fact that the communication tends to harm

the plaintiff's reputation proves only that it was defamatory. [See Restatement, Torts (Second), §559.] The plaintiff still must prove falsity.

Most recently, the Court of Appeals again reaffirmed the requirement of proving falsity in its decision in *Gaynes* v *Allen*, ____ Mich App ____ (No. 61172, August 16, 1983). In this case an optometrist had brought a libel action over an article in a non-profit newsletter published by ophthalmologists entitled "Michigan Oral Surgeon—'A Horrible Price to Pay for Someone's Incompetence.' " The article criticized the optometrist's handling of a vision problem for an oral surgeon who had claimed to have lost his vision as a result of the optometrist's actions. While the title of the article itself was certainly capable of a defamatory interpretation and could have supported an implication, inference or innuendo of incompetence on the part of the optometrist, the Court ruled as follows:

> "Thus, we hold that a private individual who seeks recovery from a media defendant for defamatory falsehoods which relate to a matter of legitimate public concern may not recover without proof that the defendant published the statements with knowledge of their falsity or with reckless disregard for their truth or falsity.

The Court's holding was specifically based upon the Restatement:

> "Our holding is consistent with the view of the American Law Institute:
>
> " '* * * [O]ne who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he
>
> " '(a) knows the matter to be false, or
>
> " '(b) acts in reckless disregard as to its truth or falsity.' Restatement Torts (Second), §600.

"In the absence of an occasion giving rise to a privilege, the Institute proposes that one be liable for publication of false and defamatory communications concerning a private person if he or she acts with knowledge of the statement's falsity and of its defamatory character, in reckless disregard of those matters, or *negligently* in failing to ascertain them. Restatement Torts (Second), §580B.

"We restrict our holding to the facts presented, and express no opinion concerning non-media defendants or purely private defamation."

(Slip Opinion, p 7)

Obviously, for a statement to be published with knowledge of falsity or reckless disregard of falsity, that statement must be false in the first instance. In this case, the plaintiffs have conceded that there are no false statements of fact and therefore they will be unable, by their own admission, to ever prove publication of any statements with knowlege of falsity of those statements.[2]

What *Gaynes* shows is that if we depart from the requirement that a plaintiff must prove false facts, all the plaintiff need prove is that defendant did not believe true some implication, inference or innuendo which some other person attributed to the publication. The decision in *Gaynes* and the decision of the Court of Appeals in this case are irreconcilable.

---

[2] While the *Postill* and *Gaynes* decisions both arose in other than Summary Judgment contexts their applicability to the issues involved in the instant matter is clear. Both, as noted above, distinctly require that as a threshold element to recover the libel Plaintiff must prove the falsity of complained of statement. That issue is the crux of the dispute before the Court where Plaintiffs do not challenge the accuracy of the published statements, but seek to recover on the basis of alleged implications from those true statements.

Appendix H

Michigan has never had Standard Jury Instructions covering libel and slander. This was remedied in August when this Court's Committee on Standard Civil Jury Instructions adopted such instructions for libel and slander. Obviously, the question now presented to this Court does not involve a dispute over a jury charge; however, these adopted instructions are particularly relevant to this case in their definition of libel and in their statement of the plaintiff's burden of proof.

"SJI2d 118.01 Libel: Definition

"Libel is a statement *(of fact) which is false in some material respect and is communicated to a third person by (printing/writing/signs/pictures) and has a tendency to harm a person's reputation.[3]

* * *

"SJI2d 118.05 Libel, Slander: Burden of Proof

"Plaintiff has the burden of proving that:

"a) defendant made the statement *(of fact) complained of to a third person by (printing/writing/sign/pictures/words/gestures), and

"**b) the statement was of and concerning the plaintiff, and

"c) the statement was false in some material respect, and the statement had a tendency to harm the plaintiff's reputation, and

[3] The Note on use provides that the parenthetical should not be used when there is a claim based upon a mixture of opinion and fact. Because there can be no false opinion when based upon true facts, the only instance where the parenthetical would not be used would be where plaintiffs claim that an opinion is actionable because it is based upon false facts. Herein the plaintiffs are claiming false implication, inference and innuendo based upon true facts.

"***d) as a result of the statement, plaintiff suffered some damage, and

"e) (insert SJI2d 118.06 and/or SJI2d 118.07 if applicable.)

"Your verdict will be for the plaintiff if you decide that all of these have been proved.

"Your verdict will be for the defendant if you decide that any one of these has not been proved.

The Notes on Use for section 118.05 are not applicable to plaintiffs' claims in this case. Rather, their claims are based upon what they claim to be the implication, inference and innuendo from statements of fact by The Detroit News. Therefore, the Michigan Civil Jury Instructions are clear that to find libel at all, there must be a "*statement of fact which is false*." The instructions are likewise clear that plaintiff must prove that the defendant made "*the statement of fact* complained of" and that "*the statement was false in some material respect*, and the statement had a tendency to harm the plaintiff's reputation."

These plaintiffs fail on both counts. They have conceded that they are not basing their claim on any false statement of fact but upon what they perceive to be the implication, inference or innuendo of those concededly true facts. Therefore what they are claiming does not constitute libel as defined in Michigan. Additionally, it is clear that the plaintiffs will not be able to carry their burden of proof as required by the Michigan Jury Instructions because they have conceded that there was no statement of fact which was false in any material respect.

Appendix H

THE NON-MICHIGAN AUTHORITY CITED IN THE COURT OF APPEALS' DECISION IS INAPPLICABLE TO THIS STATE'S LAW OR TO THIS CASE

The Court of Appeals' Opinion relied upon two cases from other jurisdictions; *Memphis Publishing Co* v *Nichols*, 569 SW2d 412 (Tenn 1978) applying Tennessee law and *Caldwell* v *Crowell-Collier Publishing Co.*, 161 F2d 133 (5th Cir 1947) applying Florida law. Defendants respectfully submit that reliance on these cases is misplaced herein for several reasons. Both cases are at odds with the uniform Michigan law discussed above; both cases involved publications which contained false statements of fact; and *Nichols* has been overruled. A brief discussion of both cases is essential.

In *Nichols*, the Memphis Press reported that a woman had shot plaintiff Ruth Nichols along with the suspect's husband at Ruth Nichols' home and that "the incident took place Thursday night after the suspect arrived at the Nichols home and found her husband there with Mrs. Nichols." (p 414). The plaintiff claimed that the implication, inference or innuendo of the article was that she was having an adulterous affair with the suspect's husband. The newspaper claimed that even if the article could have suggested that the plaintiff had not proven falsity because all of the reported facts were true. (p 420).

A close reading of the case shows that there were serious misstatements of fact in the newspaper article. For example, the incident had taken place in the afternoon and not "Thursday night" as reported, and the suspect did not go to the Nichols home and "find her husband there with Mrs. Nichols" as reported but had found a group of neighbors including her husband and Mr. Nichols talking in the living room of the Nichols home. (p 414). Therefore, there was factual falsity in that case. Moreover, the Tennessee court based its ruling on the unique proposition of Tennessee law that a plaintiff "need not show that a state-

ment is false" as long as he shows it was defamatory, i.e. had a tendency to harm his reputation. (p 420). This is directly contrary to Michigan's long-standing requirement that a plaintiff must prove not only a defamatory impact i.e. a tendency to harm his reputation but must also prove false statements of fact. Furthermore, the Sixth Circuit, in *Wilson* v *Scripps-Howard Broadcasting Co.*, 642 F2d 371 (6th Cir 1981), has specifically held that this proposition of Tennessee law relied upon in *Nichols* is unconstitutional. The Sixth Circuit discussed *Nichols*, found it constitutionally deficient, and held that it is unconstitutional to permit a plaintiff to recover without proof of factual falsity. (pp 374-376).[4] In sum, *Nichols* has no validity; even before it was overruled, it was totally opposite of Michigan law; and there were false facts in the complained of report. It has no bearing on this case.

Caldwell v *Crowell-Collier Publishing Company*, 161 F2d 333 (5th Cir 1947) involved a Colliers Magazine editorial comparing the treatment of black prisoners in North Carolina and Florida. In this editorial, Colliers referred to a recent incident in which a black prisoner under indictment for rape was "snatched from jail by a mob and shot to death." (p 334) The magazine reported Florida Governor Caldwell as having publicly stated that "he did not consider this a lynching" and that "the mob had saved the courts, etc., considerable trouble." (p 334) The Governor's libel action followed. There are several significant points. First, and as in *Nichols*, there were allegations of factual falsity.

> "Further allegations are that it was not true that the negro was snatched from jail by a mob; that the statement the Governor said he did not consider this a lynching was a distortion, imputing that the Governor

[4] The Court of Appeals' opinion therefore relies on a case that has been overruled as a matter of constitutional law. Such reliance is tantamount to reliance on a Tennessee state case decided before *Miranda* v *Arizona*, 384 US 436 (1966) holding that a criminal defendant's confession may be used against him even though he was never so warned.

did not disapprove the killing, while what he said was that it was murder, and not a lynching because there was no evidence of mob action; and that he 'opined the mob had saved the courts considerable trouble' was wholly untrue; . . ."

(p 334)

Furthermore, having had advance notice of the Colliers' editorial, Governor Caldwell had "telegraphed the publisher, the editor, and the managing editor, calling attention to the false statements *and* inferences in the editorial. . . ." (p 335) In short, the Governor alleged *factual falsity* of the most compelling nature, i.e. that he had not said what Colliers had quoted him as saying. There is no such allegation in this case.

The holding of *Caldwell* is consistent with the fact that plaintiff had alleged factual falsity.

> "A jury might well conclude that the Governor was being held up as unfaithful to his office by reason of facts falsely stated *and* implied in the editorial."
>
> (p 336)

Note that the Court specifically used the conjunctive "and" rather than the disjunctive "or". *Caldwell* clearly would not permit recovery based solely upon false implication, inference or innuendo. In this case, there are no allegations of "facts falsely stated" as in *Caldwell*. Rather, these plaintiffs have claimed they should be able to continue a libel action for "facts truthfully stated" because those facts suggest to them an implication, inference or innuendo which they do not like. *Caldwell* is inapplicable.

Finally, the Court of Appeals decision relied on 50 Am Jur 2d, Libel and Slander §13, pp 528-529 and *Prosser, Torts* (4th Ed 1971) § 111 in support of its opinion. Both of these cited authorities deal only with the question of whether a publication is defamatory, i.e. has a tendency to

harm the plaintiff's reputation. Certainly for that limited inquiry a court properly looks to the publication as a whole as well as to any implication or innuendo contained therein. Having resolved that inquiry in favor of the plaintiff, the Court must then look to determine whether or not there are any false statements of fact. See especially in this regard the Michigan Standard Jury Instructions definition at SJI2d 118.01 of libel as including false facts *and* a tendency to harm a person's reputation and the burden of proof at SJI2d 118.05 requiring that the plaintiff prove publication of statements which are factually false *and* which have a tendency to harm plaintiff's reputation. In this case, the plaintiffs have alleged only one of those elements — that the innuendo, inference and implication of The Detroit News' reports had a tendency to harm their reputation. They have not even alleged the second requirement of factual falsity and have admitted in their interrogatory answers that there are no false statements of fact.

IT IS AN UNCONSTITUTIONAL INFRINGEMENT ON FIRST AMENDMENT FREEDOMS FOR A PUBLISHER TO BE HELD LIABLE FOR DEFAMATION WITHOUT ALLEGATION AND PROOF OF FACTUAL FALSITY

The upshot of the Court of Appeals' Opinion is that a publisher may be held liable for defamation even though he has published no false statements of fact. Defendants respectfully submit that not only is this result contrary to Michigan law but that such a result is blatantly unconstitutional.

The Court of Appeals' opinion deprives the Detroit News of its guaranteed First Amendment rights by not requiring that plaintiffs prove factual falsity. In *Wilson* v *Scripps-Howard Publishing Company*, referred to at p 16 above and at pp 17-18 of defendants' main brief on appeal, the Sixth Circuit Court of Appeals specifically disapproved of the *Memphis Publishing Co.* v *Nichols* holding that proof

of falsity is not required. To the extent *Wilson* overrules *Nichols* on constitutional grounds it overrules this Court's opinion on constitutional grounds. Moreover, as a matter of federal constitutional law there can be no such thing as a false idea. Therefore, plaintiffs cannot sidestep their requirement of proving falsity by alleging false implications, inferences or innuendoes which are no more than unexpressed ideas or opinions at best.

Furthermore, the constitutional protection extended to expressions of opinion provides another basis on which this Court's opinion has deprived the Detroit News of its guaranteed constitutional rights. Federal constitutional law protects the expression of any opinion as long as that opinion is based upon disclosed facts. This principle is based on the Supreme Court's holding in *Gertz* v *Robert Welch Inc.*, 418 US 323 (1974) which has been referred to in connection with the constitutional requirement of proving falsity. It bears repeating in full:

> *Gertz* v *Robert Welch, Inc.*, 418 U.S. 323 (1974):
>
> "We begin with the common ground. Under the First Amendment, there is no such thing as a false idea. However, [sic] pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of ideas." *Id* 339-340.

The court noted that although there is "no constitutional value in false statements of fact, courts must be extremely cautious in applying sanctions simply for an erroneous statement."

> "Punishment of error runs the risk of inducing a cautious and restricted exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels the publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-

censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id* 340.

The application of this principle is best illustrated in *Orr* v *Argus-Press*, 586 F2d 1108 (6th Cir 1978), in which the defendant reported on plaintiff's indictment for a variety of Blue Sky Law violations. The plaintiff did not claim that there were any false statements of fact but objected to the defendant's words characterizing his actions as "swindle," "fraud," and "phony schemes." The Sixth Circuit held that because the facts in the indictment as set forth in the defendant's article were true, the expressions of opinion complained of were constitutionally protected.

"'A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegations of undisclosed defamatory fact as the basis of the opinion. . . .

"It is the function of the court to determine whether the expression of opinion is capable of bearing a defamatory meaning, because it may reasonably be understood to imply the assertion of undisclosed facts which justify the expressed opinion about the plaintiff or his conduct . . . Restatement (Second) of Torts, §566 (1977)."

* * *

"Neither Orr's complaint nor the opinion of the district court identified any specific, factual errors in the article . . . While the words 'swindle' may imply more serious wrongdoing than was involved here, the word is frequently used in colloquial speech as a substitute for 'fraud' . . . Although the word also connotes bad motive and an intent to defraud, the story as a whole sets forth sufficient facts concerning the circumstances of Orr's

indictment and arrest for the reader to draw his own conclusions as to Orr's motives."
(pp 1114, 1112)

The theory behind the law of the constitutional protection for opinions is that as long as a publisher gives the facts, he can make any opinion he wishes because the reader or listener likewise knows the facts that that opinion is based on, and can therefore agree or disagree with the opinion thereby beginning the competition of ideas referred to in *Gertz*. By way of example, and following the logic of *Argus-Press* and *Gertz*, a defendant could report accurate facts as to a plaintiff's financial situation and conclude with the opinion that "credit should not be extended to this person." As long as the facts as to the plaintiff's financial status were accurate, the opinion would be protected as a matter of federal constitutional law.[5] By the same logic, if The Detroit News had concluded its series on Pine Knob with the statement that based upon the facts in The News' reports on Pine Knob, "it would appear that the principals are involved with organized crime," that opinion would be protected as a matter of constitutional law.

Significantly, The News made no such opinion. Rather, it stayed solely with reporting facts. The effect of the Court of Appeals Opinion, however, is to accord The News less constitutional protection than it would have been accorded had it gone the next step and expressed some opinion of the plaintiffs that was *identical* to the implication, inference and innuendo which they claim that the complained of articles had.

---

[5] Note that federal constitutional law would today protect the merchant's opinion "in time of peace prepare for war" based upon his true factual disclosures in *Simons* v *Burnham* and would protect the Daily News' opinions of the pro-German minister based upon its true factual disclosures of his activities in *Van Lonkhuyzen* v *Daily News Co.*

CONCLUSION AND RELIEF REQUESTED

The point of the Michigan law and of the Federal constitutional law is really quite simple. If a publisher limits himself to true and accurate facts, he should not be and is not liable for any conclusion that any listener or reader draws from those true facts. If one reader draws a favorable inference and another reader draws an unfavorable inference, one of them will have necessarily drawn a false inference. However, they can now debate which of them is correct because they both have the benefit of having been given the true and accurate facts. The competition of ideas and views, in which we place so much importance, is then joined. There being no such thing as a false idea or a false opinion when based on true facts, there certainly can be no such thing as a false implication, inference or innuendo when based upon true facts.

The Court of Appeals Opinion permits a plaintiff to continue a libel action after conceding that there are no false facts. The effect of the Opinion is to hold publishers liable for statements they have not made. As such, the Opinion is directly contrary to Michigan law, the Federal constitutional law, and to the commitment to exchange of ideas and information based upon true facts.

The effect of this decision is to throw open the doors to the courtrooms of this state for libel litigation over the publication of true facts. For example, when it is accurately reported that a particular school board member has travel and seminar expenses far in excess of any other member, he will be able to claim that the implication, inference and innuendo of that truthful report is that he is wasting taxpayers' money. When it is truthfully reported that a business is under investigation by the EPA, that business will be able to claim that the implication, inference and innuendo of that truthful report is that it is indifferent to the environment and an irresponsible business. When it is accurately reported that a person has been questioned in con-

nection with a criminal investigation, that person may now claim that the implication, inference and innuendo of that truthful report is that he has committed criminal acts. In short, anyone who does not like his reflection in a mirror can now sue the mirror. This cannot be Court of Appeals intention, but it is surely the effect of its decision.

The citizens of this state have guaranteed rights of free speech. Those rights assure them that if they speak or print true and accurate facts they are protected. The Court of Appeals decision has stripped away that protection. The citizens of this state need this Court's immediate action to restore it.

Respectfully submitted,
BUTZEL LONG GUST KLEIN & VAN ZILE
A Professional Corporation

By: (s) Richard E. Rassel (P19243)
By: (s) James E. Stewart (P23254)
By: (s) Gordon J. Walker (JES) (P34468)
1881 First National Building
Detroit, Michigan 48226
Telephone: (313) 963-8142

Attorneys for Defendants

Dated: November 14, 1983

Appendix H

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs,

HON. SUSAN D. BORMAN

vs.

NO: 80-012-145 CZ

THE EVENING NEWS ASSOCIATION,
INC., a Michigan Corporation,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
ROBERT ANKENY, and JIM GRAHAM,
Jointly and Severally,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' LIBEL CLAIMS

At a session of said Court, held in the County of Wayne, State of Michigan on April 2, 1982

PRESENT: Honorable Susan D. Borman
Circuit Judge

Upon the reading and filing of defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that defendants Motion for Summary Judgment as to Plaintiffs' Libel Claims is denied.

(s) SUSAN D. BORMAN
CIRCUIT JUDGE

Approved as to form:
By: JEREMIAH J. KENNEY (P 24810)
Attorney for Plaintiffs
2000 Buhl Building
Detroit, Michigan 38226

By: JAMES E. STEWART (P 23254)
Attorney for Defendants
1881 First National Bldg.
Detroit, Michigan 48226

Appendix H

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v No. 64729

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES,
JEFF LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
and ROBERT ANKENY,
Defendants-Appellants.

BEFORE: V.J. Brennan, P.J., M.H. Wahls and M. Dodge*, JJ.

PER CURIAM

This lawsuit arises out of a series of eleven allegedly defamatory articles published in the Detroit News between April 27, 1977 and April 25, 1979 concerning the activities of plaintiffs Locricchio and Francell with regard to their development and operation of the Pine Knob entertainment complex. Defendant, the Evening News Association, Inc., publishes the Detroit News, defendant Giles is its editor and Vice-President, and the remaining defendants are reporters, staff writers, and columnists for the Detroit News.

On April 3, 1980, plaintiffs filed a ten-count complaint, the first three counts of which allege a cause of action for libel based on the news articles. The articles, consisting of in excess of 10,000 words, accompanied the complaint. On October 7, 1981, defendants filed interrogatories requesting, among other things, that plaintiffs identify with particularity each and every statement claimed to be defamatory, and

---

* Circuit Judge, sitting on the Court of Appeals by assignment.

each and every statement claimed to contain false statements of fact in each publication relied upon by plaintiffs in support of their libel claims. Plaintiffs responded in part as follows:

> "[T]*he defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the 'Mafia'; individuals of low moral and character;* that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.
>
> * * *
>
> "As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, *the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, the full portrayal, implication, imputation and/or insinuation can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other.* Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes self-evident." (Emphasis added.)

Based on these answers, defendants moved for summary judgment, GCR 1963, 117.2(3). The trial court denied the motion. Defendants take this interlocutory appeal by leave granted.

Defendants assert on appeal, as they did in support of their motion for summary judgment, that no action for libel exists here because plaintiffs admit that their allegations of defamation are not based on a specific false statement in any particular article. Defendants contend that plaintiffs' allegations that the entire series of articles falsely portrayed plaintiffs as members or associates of an organized criminal society, known as the "Mafia", cannot support an action for libel.

We disagree. " 'To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " *Sanders* v *Evening News Association*, 313 Mich 334, 340; 21 NW2d 152 (1946). The pleadings, including plaintiffs' answers to the interrogatories, raise a genuine issue of material fact as to whether the specified articles, read as a whole, carry a defamatory insinuation or inference that plaintiffs are associated with organized crime. Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion. See *Caldwell* v *Crowell Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5); *cert den*, 332 US 776 (1947), *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn 1978), 50 Am Jur 2d, Libel and Slander, §13, pp 528-529, Prosser, *Torts*, (4th ed, 1971), §111.

Plaintiffs did not concede the truth of the alleged insinuation. They specifically state in their response to interrogatories that the entire series of articles represented "a *false* portrayal implication, imputation and/or insinuation" that plaintiffs are or were members and/or associates of an organized criminal society, otherwise known as the Mafia.

The pleadings have given rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment.

Appendix H

The trial court properly denied defendant's motion for summary judgment.

Affirmed.

/s/ V.J. Brennan
/s/ M.H. Wahls
/s/ M. Dodge

Appendix H

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Seventeenth day of October in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
VINCENT J. BRENNAN
Presiding Judge
MYRON H. WAHLS
MICHAEL E. DODGE
Judges

JOSEPH JUDEUS LOCRICCHIO And
GARY FRANCELL,
Plaintiffs-Appellees,

v

Docket #64729
L.C. #80 012 415 CZ

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
And ROBERT ANKENY,
Defendants-Appellants.

In this cause an application for rehearing having been filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of October in the year of our Lord one thousand nine hundred and eighty-three.

(s) Ronald L. Dzierbicki
Chief Clerk